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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS

BY
HORACE GRAY, JR.

VOLUME VIII.

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JUDGES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY.
HON. THERON METCALF.
HON. GEORGE T. BIGELOW.
HON. BENJAMIN F. THOMAS.
HON. PLINY MERRICK.

ATTORNEY GENERAL.
HON. JOHN H. CLIFFORD.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTIES OF SUFFOLK AND NANTUCKET,
MARCH TERM 1857, AT BOSTON.

PRESENT :

HON. LEMUEL SHAW, CHIEF JUSTICE.		
HON. CHARLES A. DEWEY,	}	JUSTICES.
HON. THERON METCALF,		
HON. GEORGE T. BIGELOW,		
HON. BENJAMIN F. THOMAS,		
HON. PLINY MERRICK.		

DANIEL H. DEARBORN vs. ISAAC AMES.

The St. of 1856, c. 284, entitled "an act in addition to the several acts for the relief of insolvent debtors, and the more equal distribution of their effects," and transferring to the courts of insolvency thereby established all the jurisdiction of commissioners "under and by virtue of the acts to which this is in addition," transfers the jurisdiction over insolvent corporations under the St. of 1851, c. 327, as well as that over insolvent debtors under the St. of 1838, c. 163, and the acts in addition thereto.

By the St. of 1856, c. 284, § 1, judges of insolvency are to be appointed by the governor and council, like other judicial officers.

The St. of 1856, c. 284, §§ 1, 2, 41, transferring all the jurisdiction of commissioners of insolvency to "courts of record, to be called courts of insolvency," with judges to be appointed by the governor and council, and to hold during good behavior, does not violate the nineteenth article of amendments of the Constitution of Massachusetts, which directs that "the legislature shall prescribe, by general law, for the election of commissioners of insolvency by the people of the several counties, for such term of office as the legislature shall prescribe."

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PETITION under *St.* 1851, c. 327, § 16, by a creditor of the Boston Steam Engine Company, an insolvent corporation, to this court, sitting in equity, to order the respondent, (who had been appointed by the governor and council on the 20th of February 1855, a commissioner of insolvency for seven years, under *St.* 1848, c. 304; and also, on the 16th of June 1856, judge of insolvency for this county, under *St.* 1856, c. 284, to hold during good behavior;) to take cognizance of a petition for proceedings in insolvency, presented by said corporation to him as such commissioner, which he had dismissed for want of jurisdiction; and to restrain him from proceeding with a like petition presented by said corporation to him as judge of insolvency, upon which he had issued a warrant against their estate. The respondent and the said corporation had notice of the petition to this court.

H. Gray, Jr. (F. E. Parker with him,) for the petitioner.
 I. The *St.* of 1856, c. 284, §§ 1, 2, 41, so far as it undertakes to establish "courts of record, to be called courts of insolvency," with judges to be appointed by the governor, and to hold during good behavior, and to transfer to such judges "all the jurisdiction, power and authority that commissioners of insolvency now have and exercise under and by virtue of the several acts to which this is in addition," is unconstitutional and void; especially if construed as transferring the jurisdiction over insolvent corporations as well as over insolvent debtors.

By the Constitution of Massachusetts "all judicial officers" are to be nominated and appointed by the governor, with the consent of the council; and, "excepting such concerning whom there is different provision made in this constitution," to hold their offices during good behavior. c. 2, § 1, art. 9; c. 3, art. 1.

The nineteenth article of amendment of the Constitution, ratified by the people on the 23d of May 1855, is in these words: "The legislature shall prescribe, by general law, for the election of sheriffs, registers of probate, commissioners of insolvency, and clerks of the courts, by the people of the several counties, and that district attorneys shall be chosen by the people of the several districts, for such term of office as the legislature shall prescribe." And provision for the election by the people of all the

officers named in this amendment has been made by *St.* 1856, c. 173. At the time of the adoption of this amendment, the only powers possessed by commissioners of insolvency were those over insolvent debtors, conferred by *St.* 1838, c. 163, and the acts in addition thereto; and those over insolvent corporations, conferred by *St.* 1851, c. 327. The *St.* of 1855, c. 444, conferring on them certain powers as to the arrest of debtors on execution, did not take effect until afterwards, and cannot therefore influence the construction or operation of this amendment.

Commissioners of insolvency are not judicial officers, within the meaning of the Constitution. Their duties and powers are not judicial; but are substantially like those of masters in chancery, as to the estates of living insolvents, under *St.* 1838, c. 163, and of commissioners of insolvency upon the estates of deceased persons, under the Rev. *Sta.* c. 68. See Report of Commissioners, *Cutler's Insolvent Law*, (ed. 1853,) 155. By the terms of the statute creating the office, they were to hold for the term of seven years, unless sooner removed; *St.* 1848, c. 304, § 1; and by the uniform practice under that statute, universally acquiesced in, they were removable at the pleasure of the governor, which they could not have been, (even when that tenure was expressed in their commissions,) had they been judicial officers. *Opinion of Justices*, 3 Cush. 585. *American Ins. Co. v. Canter*, 1 Pet. 546. They have been recognized by the courts as not being judicial officers. *Sims's case*, 7 Cush. 303. *Moses v. McDonald*, 21 Maine, 556. See also *People v. Mayor and Aldermen of New York*, 25 Wend. 12, 13. And they are associated, in the nineteenth amendment of the Constitution, with executive, administrative and ministerial officers only.

But if judicial officers, they are judicial officers, "concerning whom there is different provision made in this Constitution," namely, election by the people for a term to be prescribed by the legislature. c. 3, art. 1; amendments, art. 19.

In either view, the people, by the nineteenth amendment of the Constitution, describing these officers by a name which indicated their office, or, in other words, their duties—*officium*—the nature and extent of which were already clearly defined by law.

and generally understood, have expressed their determination themselves to elect the officers who should superintend the sequestering and distributing of the estates of insolvents, and to leave the tenure of such offices within the discretion of the legislature.

The officers called "judges of insolvency" in *St.* 1856, c. 284, are in truth "commissioners of insolvency," within the meaning of the nineteenth amendment. The only privileges, conferred by that statute upon the judges, which did not belong to commissioners, are to have a seal; to have an officer to wait upon them; to punish for contempt; to issue commissions to take testimony; and to award costs at discretion. §§ 6, 7, 8, 38. No other powers are given them, which did not previously belong to commissioners of insolvency, or other inferior officers. *Merriam v. Richards*, 3 Gray, 255. *Ex parte Gladhill*, 8 Met. 171. *Peabody v. Harmon*, 3 Gray, 113. *Chamberlain v. Hall*, 3 Gray, 250. *Briggs v. Wardwell*, 10 Mass. 358. *Rev. Sts. c.* 94, §§ 5, 6. *Sts.* 1838, c. 42; 1848, c. 304, § 3; 1846, c. 168, § 1; 1851, c. 327, § 23; 1856, c. 284, §§ 9, 10, 36. If the addition of these merely incidental powers and privileges will enable the legislature to transfer the duties of one officer, whose mode of appointment and tenure of office are prescribed by the Constitution, to another officer, appointed in a different manner, and holding by a different tenure, then the legislature, after depriving this court (which they have an undoubted right to do) of these incidental powers and privileges, might transfer the whole jurisdiction and power of this court to officers with a different name, elected by the people, or holding at the will of the legislature, and thus deprive the administration of justice of all the safeguards provided by the Constitution.

If this statute is constitutional, the whole of this amendment of the Constitution may at any time be practically nullified by the legislature, by providing that, as the officer who presides over sheriff's juries exercises judicial functions, he too must have a clerk, attending constable, &c., and be called a judge, and hold during good behavior, and the office of sheriff be abolished; and by instituting in like manner a "judge advo-

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cate" in the place of each district attorney, and a "recorder" (a judicial officer well known in some states) in the stead of each register and clerk.

The legislature have no constitutional power to take away from an officer, whose mode of appointment and tenure are prescribed, and his duties defined, at least by implication, in the Constitution, all, or even the greater part, of his powers and duties, and transfer them to an officer differently appointed, and holding by a different tenure. *Warner v. People*, 7 Hill, 82, and 2 Denio, 275, 281, 282. *People v. Mayor and Aldermen of New York*, 25 Wend. 17, 34. *Brien v. Commonwealth*, 5 Met. 515.

It is admitted that the legislature are authorized by the Constitution to distribute power and jurisdiction in their discretion among officers of the same constitutional class, even though the effect of their action be to abolish an office named in the Constitution. Such were the cases of the statutes abolishing the offices of attorney general and solicitor general, and transferring their duties to other Commonwealth's attorneys, holding by like appointment and tenure. *Ses.* 1820, c. 78; 1832, c. 130, §§ 8-12; 1843, c. 99. *Rev. Sts. c. 13*, §§ 28, 36, 42. But an amendment of the Constitution seems to have been considered necessary to authorize the election of those district attorneys by the people.

It is upon the same ground, that the cases of transfers of jurisdiction from one court to another, under the constitutional power to establish judicatories, must stand; such as the statutes transferring the jurisdiction of justices of the peace in Boston to the police court, of the municipal court of Boston to the court of common pleas, and of commissioners of highways to county commissioners. *Constitution, c. 1, § 1, art. 3. Wales v. Belcher*, 3 Pick. 508. *Brien v. Commonwealth*, 5 Met. 508. *Springfield v. Commissioners of Highways*, 6 Pick. 508. *Stuart v. Laird*, 1 Cranch, 309. But that cannot be done so as to affect a court or tribunal the jurisdiction of which is defined and limited by the Constitution. *Marbury v. Madison*, 1 Cranch, 174, 175. *Martin v. Hunter*, 1 Wheat. 330. *Cohens v. Virginia*, 6 Wheat. 400. By Taney, C. J., in 13 How. 53, note.

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There is no doubt, also, that offices, the tenure of which is not fixed by the Constitution, may be abolished by the legislature, without giving the incumbent, at least, any right to complain. *Butler v. Pennsylvania*, 10 How. 402. *Taft v. Adams*, 3 Gray, 130. But the question here is not of the right of a particular incumbent to hold the office, but of the right of the people, (so long as the laws creating the office and its duties remain unrepealed,) to have the officer, whoever he may be, appointed and responsible in a particular manner, which they have declared.

II. If §§ 1, 2, 41, of *St.* 1856, c. 284, are constitutional and of any effect, they do not change the jurisdiction over insolvent corporations. The Rev. Sts. c. 2, § 6, cl. 13, only provide that "the word 'person' may," (not "shall," as in other clauses in that section,) extend and be applied to corporations. The title may be referred to, to show the scope of a statute. *Stradling v. Morgan*, Plow. 203. *The King v. Gwenop*, 3 T. R. 137. *United States v. Palmer*, 3 Wheat. 631. This statute is entitled "an act in addition to the several acts for the relief of insolvent debtors and the more equal distribution of their effects"; and purports to transfer to the judges of insolvency nothing but the jurisdiction, power and authority of commissioners of insolvency, "under and by virtue of the several acts to which this is in addition." This court decided, in 1847, that the words "insolvent debtors," in those acts, did not include corporations. *Sargent v. Webster*, 13 Met. 503. And the legislature, in using the same words since that decision, must be deemed to have adopted that judicial construction. *Commonwealth v. Hartnett*, 3 Gray, 450. The *St.* of 1851, c. 327, entitled "an act to secure the equal distribution of the property of insolvent corporations among their creditors," is not, in name or effect, one of those acts.

The *St.* of 1856, c. 284, does not mention or allude to insolvent corporations, nor contain any provisions especially applicable to them, although it does on almost every other branch of the insolvent law, including insolvent partnerships; but on the contrary, contains provisions as to the debtor's certificate of discharge, and as to punishing by imprisonment fraudulent preferences as misdemeanors; which cannot be applied to corporations. *St.* 1856, c. 284, §§ 30, 31, 35

Some reason for leaving the jurisdiction of insolvent corporations in the commissioners may perhaps be found in the fact that the *St.* of 1851 did not confer on commissioners, in the case of insolvent corporations, two of the most important powers exercised by them in the case of insolvent debtors, namely, the granting of a certificate of discharge; and the power to suspend proceedings, either on giving bonds to dissolve attachments, or with the consent of all persons interested. *Sts.* 1848, c. 304, § 13; 1851, c. 189, § 3; 1851, c. 327, §§ 16, 17. *Cheshire Iron Works v. Gay*, 3 Gray, 534. The powers belonging to commissioners of insolvency, in the case of corporations, are only, (1.) To issue a warrant for the attachment and sequestering of all the property of the corporation—which must be summary in order to be effectual, and is no greater than the power possessed by every creditor before the statute; *O'Neil v. Glover*, 5 Gray, 161; and such a warrant may be summarily superseded by the court, on the petition of any party aggrieved. *Sts.* 1838, c. 163, § 18; 1851, c. 327, § 16. *Thompson v. Snow*, 4 Cush. 121. (2.) To superintend the collection, and conversion into money, of the property of the corporation. (3.) To preside at meetings of creditors, and appoint a clerk. (4.) To hear proofs of claims against the estate, examine the creditors under oath, and allow their claims, subject to revision, on appeal, by a trial at common law—which are the same powers possessed by commissioners of insolvency appointed by the judge of probate on the estates of deceased persons, ever since 1790. *Sts.* 1784, c. 2; 1789, c. 50. *Rev. Sts.* c. 68.

But even if no reason for the separation of the jurisdiction is apparent, courts are bound by the words of the statute, when clear and unambiguous; and cannot, from considerations of policy, extend the meaning beyond the words. *Denn v. Reid* 10 Pet. 527. *Jones v. Smart*, 1 T. R. 52. *Brandling v. Barrington*, 6 B. & C. 475. *Dwarris on Sts.* (2d ed.) 583, 704.

An additional reason for adopting the construction contended for by the petitioner is, that it weakens the constitutional objection before suggested; although, as the *St.* of 1856, c. 284, even by this construction, undertakes to transfer to judges the greater

part of the duties of commissioners, that objection is not removed. *Warner v. People*, 7 Hill, 82, and 2 Denio, 275, 281, 282.

III. The *St.* of 1856, c. 284, § 1, may perhaps be held constitutional, and reconciled with *St.* 1856, c. 173, upon the following literal construction, which would show, however, that the respondent, having been appointed by the governor and council, and not by the people, has no authority over this case as judge.

That section provides that each judge of insolvency "shall be appointed, commissioned and qualified, in the manner prescribed by the Constitution," and "hold his office during good behavior." The general word "appointment" includes election by the people. U. S. Constitution, art. 1, § 6; art. 2, § 1; amendments, art. 12. Constitution of Mass. c. 2, § 1, art. 9; amendments, art. 4. *Commonwealth v. Sutherland*, 3 S. & R. 149, 150, 155. *Johnston v. Wilson*, 2 N. H. 202. "The manner [of appointment] prescribed by the Constitution" is election by the people, though the term of office is to be fixed by the legislature. Constitution of Mass. amendment 19; *ante*, 2, 3. That term of office, having been fixed, at first, by *St.* 1856, c. 173, § 1, at three years, was, before that statute took effect, extended to a tenure during good behavior, by *St.* 1856, c. 284, § 1. The acts of appointing and commissioning are distinct acts; and a commission may well be required from the governor, for officers not appointed by himself. U. S. Constitution, art. 2, §§ 2, 3. *Marbury v. Madison*, 1 Cranch, 156.

The provision, at the end of *St.* 1856, c. 284, § 1, that, "as vacancies shall occur, the same shall be filled in the manner prescribed by the Constitution for appointing and commissioning judicial officers," applies only to a case of a vacancy occurring after the office has been once filled by the people. U. S. Constitution, art. 1, § 3; art. 2, § 2. 1 Story on U. S. Constitution, (2d ed.) § 727, *note*. 2 Story on U. S. Constitution, § 1559. Sergeant's Constitutional Law, 373. And an officer so appointed could hold only "until the annual election in November thereafter." *Sts.* 1856, c. 173, § 1; c. 284, § 1. The reason for mentioning "judicial officers" in the last clause of *St.* 1856, c. 284, § 1, is, that they were the first named and most impor

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tant of the officers whose appointment was vested in the governor by the original Constitution; and the only ones there named, (unless perhaps coroners,) the appointment of whom remains in the governor since the amendments of 1855. Constitution of Mass. c. 2, § 1, art. 9; amendments, arts. 17, 19. And compare amendments, art. 4. If the original appointments of judges of insolvency were to be made in the same manner as appointments to fill vacancies, the insertion of a special provision as to the latter would be unprecedented and unnecessary.

A. H. Fiske, for the respondent.

SHAW, C. J. Two questions arise upon this petition: 1. Whether, by force of the *St.* of 1856, c. 284, the jurisdiction previously given by law to commissioners of insolvency, in cases of insolvent corporations, was in terms, or by necessary implication, transferred to and vested in the courts of insolvency thereby established. 2. If it was so transferred, whether that act itself is constitutional and valid, and has the force of law.

1. Upon the first question, the court are of opinion, that the cases of insolvent corporations, provided for by the statute of 1851, were intended by the statute of 1856 to be vested in the courts of insolvency, thereby established.

The object of the statute of 1856 seems to have been to introduce a system for the administration of this department of the law of debtor and creditors, somewhat more formal and specific, more symmetrical and conformable to the ordinary course of proceedings in courts of justice, than that which previously existed; and all the reasons which would appear to render such a change useful and beneficial in regard to the settlement and distribution of the estates of insolvent individuals, would apply with equal, if not greater, force to insolvent corporations, where large and complicated interests are often involved, and numerous persons, debtors and creditors, deeply interested in the proceedings. But in order to see whether it was included in terms, or by necessary implication, we must look to the act itself, and the state of the law as it then stood.

It will be perceived that this act was passed about five years

after the act of 1851, embracing corporations in the insolvency system of the state, by which last act the jurisdiction in regard to corporations was vested in the same class of officers, who then had jurisdiction in case of individual insolvents. The modes of commencing proceedings are alike, being in certain cases voluntary on the part of debtors, and commenced by them, and in other cases adverse, and commenced by the creditors. The title of the statute of 1856 is, "An act in addition to the several acts for the relief of insolvent debtors, and the more equal distribution of their effects." When one act is intended to be a supplement or appendix to a particular previous act, the practice, we believe, is, to cite the previous act, to which it is intended as an addition, literally by its title; and this is often designated by marks of quotation. Here is no such citation of title or marks of quotation; but it refers to acts described rather than named, and described by the subject matter to which they relate, to wit, "the relief of insolvent debtors and the more equal distribution of their effects."

In general, the title of an act is not of itself much relied upon in the exposition of the statute itself. But in the present case, the same terms are used, in § 2, conferring jurisdiction on the courts of insolvency, thereby created, and also in the repealing clause. That section declares, that "said judges shall have all the jurisdiction, power and authority that commissioners of insolvency now have and exercise, under and by virtue of the several acts to which this is in addition; and all the provisions in said acts contained shall apply in like manner to said judges respectively, as they apply to judges of probate, masters in chancery, and commissioners of insolvency, except so far as said provisions, or any of them, may be by this act modified or repealed."

In this clause, the words "the several acts to which this is in addition," are somewhat equivocal, and if there were any part or clause, showing an intent to limit its operation to the case of insolvent individuals, then the words in question might be so limited. But in the absence of any such limitation, we think it more consonant with the intention of the legislature, not to con-

strue these words to mean merely "the several acts for the relief of insolvent debtors, and the more equal distribution of their effects." All the provisions of this act are as well adapted to meet all the requisitions in cases of insolvent corporations, as of living insolvent individuals. The commencement, conduct and close of insolvent proceedings are, we believe, the same in both cases, with this exception, that no discharge is granted to corporations as in case of individuals. But this is not a difference which would indicate the propriety of any difference of jurisdiction; on the contrary, if they are within the act, then the same provisions of law, which before applied to judges of probate, masters in chancery, or commissioners, shall apply to the courts of insolvency. The term "insolvent debtors," without restraint or qualification, must naturally be understood to include corporations, whether deemed a body politic constituting a person in law, or an aggregate term, embracing the individuals of which it is composed. Why the act of 1851 did not provide for the discharge of the debts of corporations, does not distinctly appear. One reason may be that the very result of insolvent proceedings would be either to pay their debts in full, and so render a discharge unnecessary, or wind up their concerns, and in effect put an end to their existence.

At the time this act was passed, that of 1851 had been in force several years, entitled, "An act to secure the equal distribution of the property of insolvent corporations among their creditors." Many of the provisions of that act are identical with the provisions of the insolvent laws in force when it passed, with particular provisions interspersed, adapted specially to the condition of corporations. Although it is not expressed in the title to be an act for the relief of corporations, perhaps because no discharge was provided for, yet it is well understood that the mere title to an act seldom embraces the whole object of an act, but it is exact enough, if it represents the leading purpose of the act, and is sufficient to identify it. The great and leading purpose of all the insolvent acts is to effect an equal distribution of the property of insolvent debtors, whether individuals or corporations. The description of the previous acts might undoubtedly

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have been more full and exact; and upon the literal interpretation of the statute, the question is not free from doubt. But the question here is, whether, by the terms which they have used, the legislature by fair intendment have included insolvent corporations; and we think they have. They were manifestly following out a system of policy, begun in 1838, and extended by various subsequent acts, that of securing an equal distribution of estates, when they were insolvent and insufficient to pay all creditors in full; and there is no clause or phrase in this last act, indicating an intention to make any distinction between insolvent individuals and insolvent corporations. The words, in the title of this act, to which the subsequent clauses in the act refer, to wit, "in addition to the several acts for the relief of insolvent debtors, and the more equal distribution of their effects," are broad enough to embrace all existing statutes on those subjects, if so intended.

The repealing clause, in the forty-first section of the act, does not, perhaps, add much weight to the conclusion we adopt, though wholly consistent with it. It repeals "so much of the several acts to which this is in addition," (using the same language as before,) "as gives jurisdiction to judges of probate, masters in chancery and commissioners of insolvency, and all other provisions in said several acts inconsistent with the provisions of this act." It brings us back to the same question, what were intended as the "several acts to which this is in addition," thus referring to them by their subjects, and not by their titles. Considering, as we do, that the legislature had in contemplation all the then existing laws of the Commonwealth, providing for the settlement of the estates of living insolvents, in a mode equitable and beneficial to all parties, intended to embrace all acts then in force, having this object in view, including the statute of 1851, making numerous and detailed provisions for the sequestration and distribution of the estates of insolvent corporations, both on their own application, and, in certain cases, on the application of their creditors, it is quite impossible to believe, that the legislature intended to exclude them; and as the literal interpretation is not inconsistent with such intent, we must re-

gard it as the true interpretation, and hold that corporations were included.

2. The next question is, whether the act providing for the establishment of courts of insolvency, to exercise the same jurisdiction as that before exercised by commissioners of insolvency, with some alterations, is constitutional.

The doubt arises from this consideration; that, before the passing in June 1856 of the act constituting courts of insolvency, an amendment of the Constitution had been proposed and adopted by the legislature, and ratified in May 1855 by the people, in the manner provided for the amendment of the Constitution, (being now the nineteenth article of the amendments,) directing the legislature to prescribe, by general law, for the election of sheriffs, registers of probate, commissioners of insolvency, and clerks of the courts, by the people of the several counties, and that district attorneys should be chosen by the people of the several districts, for such term of office as the legislature should prescribe. The legislature had also passed an act on the 10th of May 1856, directing "commissioners of insolvency," with the other officers named, to be chosen by the people, to hold their offices three years. *St.* 1856, c. 173.

The argument is, that, as the Constitution had provided for the election of commissioners of insolvency, the act transferring their jurisdiction to courts of record, to be exercised by another class of officers, to be appointed by the governor and council, in the manner in which judicial officers in the original Constitution are required to be appointed, is in effect a mode of declaring that, under another title or description, commissioners of insolvency shall be appointed by the governor and council, and so is repugnant to the Constitution as thus amended. But we think this is not the character of the act in question.

By the original Constitution, c. 1, § 1, art. 3, "the general court shall forever have full power and authority to create and constitute judicatories and courts of record, or other courts, giving them jurisdiction over all matters criminal or civil."

The next provision in the Constitution, art. 4, gives full powers to the general court, to make all manner of wholesome

and reasonable orders, laws, statutes and ordinances, directions and instructions; and to name and settle annually, or provide by fixed laws for the naming and settling of all civil officers within the said commonwealth, the election and constitution of whom are not hereafter in this form of government otherwise provided for; and to set forth the several duties, power and limits of the several civil and military officers of this commonwealth.

These appear to us to be two distinct and separate powers, having distinct objects, each of which may have its full, fair and legitimate exercise, although such exercise of the one may in some respects interfere with arrangements made under the other. The power to erect courts and judicatories, coupled with an authority to define and limit the powers and duties of all civil officers, gives power to the legislature to fix and limit the jurisdiction of all such courts and judicatories. And we think it can be no just objection to the exercise of one of these powers thus expressly granted, that it may have the effect to transfer power, authority or jurisdiction from one class of judges or officers whose appointment in a particular mode is provided for in the Constitution, to another class whose appointment is left by the Constitution to be provided by law, or *vice versa*, when, in the judgment of the legislature, such change and distribution of powers will subserve the welfare of the public.

Under this power to erect judicatories, we think it has been the practice of the legislature, from the adoption of the Constitution, to erect and establish new judicatories, other than the supreme judicial court, to transfer jurisdiction from one court to another, in part or in whole, and to enlarge, restrain and regulate the jurisdiction of all courts. The changes which have taken place by law in the court of sessions are signal instances. Originally composed of all the justices of peace of the county, and invested with a considerable criminal jurisdiction; then composed of a small number of judges; afterwards its judicial powers transferred to the court of common pleas, and its administrative powers, first to commissioners of highways, then to county commissioners; and ultimately the entire abolition of the court of sessions itself. Similar changes have taken place, both

in the constitution and in the jurisdiction of the courts of common pleas, which are familiar to all those conversant with the legislation and jurisprudence of the Commonwealth. Yet, though the effect was to transfer jurisdiction from judges, the mode of whose appointment was directed by the Constitution, to officers otherwise appointed, in modes directed by law, we believe that those acts have never been considered as violations of the Constitution.

So in regard to the other power of the legislature, to provide for the appointment of all civil officers, where not otherwise provided in the Constitution. When the Constitution requires that certain officers, designated by titles, whose duties and powers are either prescribed by statute, or, being common law officers, are defined and limited by the rules of the common law, and who exercise the powers and duties, implied by law from the titles of such officers, shall be appointed or chosen in a particular manner, it is certainly not competent for the legislature to provide that officers, thus designated by the titles of the offices they hold, shall be chosen or appointed in any other way. But if the legislature, under the power vested in them, and judging that some or all of the powers vested by law in one class of officers, designated by these titles, may be more beneficially exercised by another and distinct class of officers, we think it is competent for the legislature to prescribe the mode in which such other class of offices shall be constituted.

Such an instance is found in case of the attorney general and solicitor general. These officers have powers and duties, prescribed and defined by the common law, and implied by their titles. The original Constitution provided that they should be appointed by the governor and council. But no solicitor general was appointed till twenty years after the adoption of the Constitution. But when the increase of business, especially in Maine, then part of Massachusetts, required such an office, a solicitor general was appointed. Again, after the separation of Maine it was found, or supposed, that both officers were not necessary, and it was provided by law, that when either office should become vacant, the powers of both should be exercised by the

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occupant of the other. Afterwards, both officers were superseded, and the powers incident to both transferred to, and distributed amongst local officers, each executing like power with the attorney general, within specified limits. Now a provision is made, that the attorney general shall be chosen by the people, but no similar provision is made for a solicitor general. Constitution, amendment 17. We suppose, if the public exigencies should now require the reestablishment both of an attorney general and solicitor general, the former must be elected by the people, and the latter appointed by the governor and council, simply because the Constitution has thus directed that these officers, thus designated by their titles, must be so appointed. Such results would follow, not because the two offices differ in their nature, but because the Constitution, as amended, thus directs.

Take another illustration. When our Constitution was formed, the State had the entire control of the organization of the militia, though part of that power has been since transferred to congress. There is a provision that major generals shall be chosen by the concurrent vote of the two houses of the legislature. *c. 2, § 1, art. 10.* Now supposing that, in the progress of military science and practice, it should be found expedient to provide for the appointment of an officer of a higher grade, as lieutenant general, or field marshal; it would seem competent for the legislature to make such provision, and provide for the appointment of such officer, either by the legislature, by the governor and council, or by popular election, although most or all of the powers and functions of a major general would thus be transferred to another class of officers.

But there is another limitation upon the power of the legislature, in regard to appointments, where the officer to be appointed is not designated by an established title, but by a definite description of his functions. As, for instance, all judicial officers shall be appointed by the governor and council. Constitution *c. 2, § 1, art. 9.* It may be often difficult to ascertain, in particular instances, whether the office falls within the description, and whether the duties assigned to an officer make it a judicial

office or not. But this point being settled, the provision of the Constitution is as imperative and obligatory, as when an office is designated by a well known title.

The reasonable and practical exposition of the Constitution, in this respect, seems to us to be this: that where an office is already existing, or afterwards to be created by law, if it comes within a designation of an office mentioned in the Constitution by name, or by any term strictly synonymous, it must be filled in the manner provided by the Constitution. So if it falls within a class definitely described, as "judicial officers," the rule of the Constitution must be followed. But if the object of a statute is to establish a new judicatory, or a new arrangement of existing powers and duties of offices, created by such statute, either not designated in the Constitution by the title, or where such officer does not fall within a class specified in the Constitution by a definite description, it is competent for the legislature to provide the mode in which such officer shall be elected or appointed, although the effect and operation may be to transfer powers from officers elected under the provisions of the Constitution, to a class to be thus newly appointed.

As to this last point, the transfer of powers, perhaps an illustration may be drawn from the case of notaries public. They are a class of officers exercising a great variety of powers, some very indefinite, some of which are *quasi* judicial, and some merely executory. By the original Constitution, these officers were to be elected by both houses of the legislature in convention. Supposing, instead of changing the mode of appointment, by an alteration of the Constitution, which was done in 1820, the legislature had provided for transferring the *quasi* judicial powers of notaries public to certain designated courts of record; and those of an executory and miscellaneous character to mayors of cities, or justices of the peace—the object being to make a better provision for the exercise of the same functions—it appears to us that it would have been competent for the legislature to do so, although, when such officers, so designated by a title, were to be chosen, they must be chosen by the legislature.

Then, to consider this act in reference to these views of the

constitutional power of the legislature, it appears to us that the object of the legislature was to provide for the more efficient administration of a large department of the law in civil matters, affecting deeply the rights of debtors and creditors of all classes—a department which has grown from small beginnings to be a great system. As a necessary incident, it transferred the greater part, if not the entire jurisdiction of commissioners of insolvency to a court of record, with powers somewhat enlarged, and different in their mode of administration. It provided for a permanent judge with a fixed salary, to be appointed in the manner prescribed by the Constitution for the appointment of judicial officers, and to hold his office upon the like tenure; and provided for a permanent clerk to keep and authenticate records. The same powers and jurisdiction had been changed by law, first vested in judges of probate, the mode of appointment of whom was fixed by the Constitution, and masters in chancery, whose offices were created by law, and held for a limited term; then transferred to commissioners of insolvency, first appointed by the governor and council for a term of years, but afterwards, by an amendment of the Constitution, directed to be chosen by the people.

But this amendment of the Constitution did not confer, limit or define the powers or duties of commissioners of insolvency; these were fixed and established by previous laws, then well known and understood. It provided that this class of officers, when to be appointed at all, should be elected by the people. It designated them by a well known title. But the powers which had previously been defined and conferred by law, could, we think, be modified, enlarged or diminished by law, notwithstanding a change in the mode of appointment.

It was suggested, in the argument, that the words "commissioners of insolvency" should be construed as words of description, and not as words of title, and so included any officers who may be charged with the administration of this department of this law. But it appears to us quite impossible so to construe them. The term had acquired a well known and definite meaning; the law had provided for the appointment of officers of that

title ; officers had been appointed and commissioned with that title ; and the words seem to us to designate a title as much as that of justice of the peace, or notary public. The amendment of the Constitution did not, under the title of "commissioners of insolvency," intend any and all officers, who might in any mode be invested with the administration of the laws relative to insolvents, however they might be altered or modified ; but to provide for a class of officers, designated by a familiar title, like "attorney general," "solicitor general," "district attorney," "county commissioner," and the like.

We have already alluded to the consideration, that, although the act transfers the jurisdiction from commissioners of insolvency to courts of insolvency, yet it is with some additional powers and functions. The judge is invested with a more permanent tenure, holding a court of record, (a higher grade than that before held by a commissioner,) with a compensation apparently designed to enable him to devote all his time and attention to the duties of such court. He has exclusive jurisdiction through the whole county, whereas several commissioners might before be appointed in each county, with concurrent jurisdiction. He is invested with larger powers, he may award costs in certain cases, and issue execution therefor, in like manner as practised in courts of common law. Taking all the provisions of the statute together, it seems designed to render the administration of this important department of the law more orderly and systematic, and more analogous to the regular course of legal proceedings in other tribunals.

We think the recent amendment of the Constitution, from the time of its ratification, is to be regarded as an integral part of the frame of government, and is to have the same force and effect as if it were a part of the original Constitution, and no greater, except that it abrogates all constitutional provisions inconsistent with it. So regarding it, we think it has been the frequent practice under the Constitution, to alter, change and transfer the duties and powers of tribunals and officers, judicial and others, although their appointment was provided for in terms by the Constitution, and, although at the time of their

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appointment, and by force of such appointment, they were vested with powers and jurisdiction well defined, known and understood; and we believe that such jurisdiction has been altered, modified and transferred from time to time as the exigencies of the times and the public interests have seemed to the legislature to require, without being supposed to be in violation of the Constitution. In some cases, especially that of the attorney general and solicitor general, the offices themselves have been modified, abolished and reinstated. This practice under the Constitution affords some evidence of the contemporaneous and early construction in regard to the powers of the legislature, put upon the Constitution by its founders and early expounders.

On the whole, the court are of opinion that the statute in question was constitutional; that, at the time of the petition of the Boston Steam Engine Company to the respondent, he rightly took cognizance thereof as a judge of the court of insolvency, for the county of Suffolk; that he had no authority to take cognizance thereof in his capacity of commissioner of insolvency; and that the proceedings before him were regular.

Petition dismissed.

On the day of the delivery of the above opinion, the justices made the following answer to an order from the senate of the 16th of February last:

“To the Honorable the Senate of Massachusetts: The undersigned, justices of the supreme judicial court, in answer to the question proposed to them by the senate, by their order passed on the 16th February last, respectfully submit the following opinion:

“The question is thus stated: Is that portion of the act of 1856, c. 284, for the relief of insolvent debtors and the more equal distribution of their effects, which takes jurisdiction of that subject from commissioners and gives it to the court and judges, as therein provided, constitutional?

“As preliminary to the answer, we would repeat the obvious remark, so often made, that all reasonable presumptions are to

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be made in favor of an act, passed under all the forms of legislation; and that no such act can be judicially declared invalid, as having exceeded the powers of the legislature, unless it appears manifestly repugnant to the express provisions or the established principles of the Constitution.

“Upon consideration of the question proposed, the undersigned are of opinion that the act of 1856, *c.* 284, providing for the establishment of courts of record in each county, to be held by judges, to be appointed in the manner prescribed in the Constitution for the appointment of judicial officers, and to hold their offices by a like tenure, each to hold sessions in his own county, with a permanent clerk, and transferring to those courts the duties, powers and jurisdiction in matters of insolvency previously exercised by commissioners of insolvency, with such additions and modifications, as are provided for in said act, was one which it was competent for the legislature to pass, and was not unconstitutional.

Boston, 26th March 1857.

LEMUEL SHAW,
CHARLES A. DEWEY,
THERON METCALF,
GEORGE T. BIGELOW,
PLINY MERRICK.

“I assent to the opinion expressed by the other justices, upon the single ground that the act is not so clearly unconstitutional, its invalidity so free from reasonable doubt, as to make it the duty of the judicial department, in view of the vast interests involved in the result, to declare it void.

BENJAMIN F. THOMAS.”

HENRY LINCOLN & others vs. HOPE INSURANCE COMPANY.

The insertion of the words "not liable for any repairs made in California," in a policy of insurance on a vessel, which contains the usual printed clause that "the insured shall not have the right to abandon the vessel for the amount of damage merely, unless the amount which the insurers would be liable to pay, under an adjustment as of a partial loss, shall exceed half the amount insured," does not prevent the assured from making an abandonment and claiming a constructive total loss, if the vessel is stranded in San Francisco, and cannot be thoroughly repaired there at a cost of less than three fourths of her value, if the expense of such temporary repairs there as will make her seaworthy to be navigated to New York, (the nearest port at which full repairs can be made,) with the expenses of such navigation and of full repairs at New York, would exceed three fourths of her value.

In computing a constructive total loss, the cost to be estimated is what it will cost to completely and thoroughly repair the vessel, not merely what will make her seaworthy, capable of keeping the sea with cargo.

An abandonment which states that the vessel has been stranded at San Francisco, and is so much injured as to render it necessary to place her on shore, and that she cannot be repaired there, is sufficient to authorize the assured to recover a constructive total loss upon the ground of the amount of damage and the cost of repairs at the nearest port at which repairs can be made.

In computing a constructive total loss, the cost of taking a vessel from the place where she is stranded to the nearest port at which she can be completely repaired is to be taken into consideration.

ACTION OF CONTRACT to recover a constructive total loss under a policy of insurance for \$9000, on the Barque Orion, valued at \$18,000, for one year from the 8th of November 1849, at the rate of six per cent.; "to add one per cent. if in the North Sea between October 1st and March 1st; and to add one per cent for each passage to or from Mexico or Texas; also to add one per cent. for each time she may proceed into or out of Columbia River, Oregon." Upon the face of the policy these words also were written: "Not liable for any repairs made in California;" and this clause printed: "It is also agreed, that the insured shall not have the right to abandon the vessel for the amount of damage merely, unless the amount which the insurers would be liable to pay, under an adjustment as of a partial loss, shall exceed half the amount insured."

At the trial before *Merrick, J.*, it was in evidence that the vessel sailed from Boston for San Francisco on the 12th of No-

venember 1849 with a cargo of lumber; that she was sent out to the Pacific Ocean by her owners on a voyage for three years; (the master and owners meaning to employ her during that time, among other purposes, in carrying passengers between San Francisco and Panama, which was then a good business;) that she arrived safely off the port of San Francisco on the '0th of May 1850, and on the next day the master, having been unable to procure a pilot, attempted to work the vessel into the harbor, and in so doing ran her upon a rock, where, the weather being calm, she lay for thirty six hours, and until she was lightened; that she was then drawn up into the mud, in a secure place, and there remained in safety until the autumn, and might have remained in safety for a year; that while upon the rocks she leaked and was somewhat strained, but upon being hauled off into the mud became tight; that a survey was had upon the 12th of June, and on the 2d of July the master, without waiting for instructions from the owners, sold her by auction for \$5000; that the purchaser afterwards hauled her upon the beach, and repaired her at an expense of \$4000, (\$2700 of which was occasioned by hauling her up for examination,) and sold her for \$12,000; that, with the repairs so made upon her, she sailed for New York, taking a cargo of passengers to Realejo in Central America, at which place she arrived tight, but got ashore there and injured her bottom, and upon getting off sailed to Valparaiso in ballast, and thence to Rio Janeiro in ballast, and thence with a cargo of hides and coffee to New York, where she delivered her cargo in good condition; that upon her arrival at New York she was taken into dock, and put in a state of thorough repair at the further expense of \$2300; that while she lay in San Francisco there was a monthly steam communication with Boston, where her owners, who were merchant of credit, resided, and received notice of this accident on or before the 27th of June, and on that day sent to the defendants the following letter of abandonment:

“ Boston, June 27th 1850. Samuel Quincy Esq., President Hope Insurance Company, Sir: Being advised by Captain Henry C. Bunker, master of the Barque Orion, that the vessel stranded

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in entering the port of San Francisco, and was so much injured as to render it necessary to place her on shore, and that she cannot be repaired there, we hereby abandon said vessel to the Hope Insurance Company, and claim payment of a total loss of the amount insured by their policy on said vessel, No. 4841, dated the 8th November 1849. As soon as the papers shall be received we shall hand them to you.

“Respectfully your obedient servants,

“Henry Lincoln & Co.”

The substance of the instructions prayed for, and of those given to the jury, is stated in the opinion. A verdict was returned for the plaintiffs, and the case reported to the full court, before whom it was argued at November term 1855.

C. G. Loring & H. Jewell, for the plaintiffs.

R. Choate & J. M. Bell, for the defendants.

THOMAS, J. This is an action of contract upon a policy of insurance. The report finds that the vessel was stranded at San Francisco; that she could not be repaired there so as to make her in all respects as good as she was before, but that she could have been so repaired at that port as to have been made seaworthy. It is found, that temporary repairs at San Francisco, the expense of navigating her to New York, (the nearest port where full repairs could be made,) and the expense of such full repairs at New York, would equal three fourths of her value. She was abandoned by the assured.

The court instructed the jury that if the vessel could not be thoroughly repaired at San Francisco at a cost less than three fourths of her value, nor partially repaired there and thoroughly repaired at New York for such sum, including expenses of navigation thereto, the owners had a right to abandon and recover for a total loss.

But for a special provision in this policy, no question could be made as to the correctness of these instructions. That provision or limitation is “not liable for repairs made in California.”

The plaintiffs made no repairs in California, and make no claim for repairs there. But the defendants say that, under the policy, the insured have not the right to abandon the vessel for the

amount of damage merely, unless the amount which the insurers would be liable to pay under an adjustment as of a partial loss, shall exceed half the amount insured; that the criterion is the damage which the insurers would be liable to pay, and that, as no expense of repairs at San Francisco is to be paid by them, said expense is to be excluded in the estimate for a constructive total loss.

Such is not, we think, the sensible and just construction of the contract. Whether the defendants are to be liable for repairs made in California is one thing; whether the vessel is to be deemed constructively lost, upon an estimate for repairs made at the place of the injury, is another. The provision in the printed policy is made *alio intuitu*, and in reference to the general principles by which the right to abandon, where there is not an absolute loss, is to be regulated.

The parties have used a printed form of policy, containing the provision common to the policies in this commonwealth, as to the right to abandon for the amount of damage merely. They have inserted a limitation in another part of the policy, by which they are "not liable for repairs made in California."

What the insurers meant to guard against was, we think, the being liable, in case of partial losses, for repairs, as such, made in California, at the enormous prices at which only, as it is well known, labor and materials could then be procured in that country. We think the exception was not designed to affect the right of the insured to abandon and claim for a total loss.

Such a construction of the contract would defeat its purposes. That the vessel was intended to be used in the Pacific is shown from the face of the policy, indeed from the very exception itself. But this construction would render the policy of little or no value while on or near the coast of California. If the loss was such that it could be repaired in California at an expense less than half the amount insured, the assured must of course bear it themselves. It would fall within the exception. If the vessel could be repaired in California, and the expense would exceed half the amount insured, the plaintiffs, under the construction of the defendants, must also pay the expense, and could not aban-

Lincoln & others v. Hope Insurance Company.

don. If the expense of partial repairs at California, and of complete repairs at New York, and the expense of navigation thereto, should exceed half the amount insured, the plaintiffs could not abandon and claim for a total loss; they could only recover for the expense of navigating the vessel to New York, and of the additional repairs made there. The only event in which they could abandon and claim for a constructive total loss, would be when, having paid themselves the expense of repairs at California, to make the vessel navigable and seaworthy to New York, it was found that the expense of the additional repairs at New York, and of her navigation to that port would exceed three fourths of the value, allowing one third new for old; a contingency not very likely to occur.

This construction would substantially, and to all practical purposes, defeat the right to abandon and claim for a total loss by reason of the extent of damage. Such, we think, were not the intent and purpose of the exception. It has a clear, definite purpose to be effected, without thus extending it, to wit, to release the underwriters from the expense of repairs in California in case of partial losses.

Nor if, departing from the spirit, we were to adhere to the exact letter of the contract, would the case fall within the exception. The plaintiffs do not claim for repairs made in California. To these the limitation is literally restricted. The contract does not say the defendants shall not be liable for losses incurred in California. If the injury were of such nature that the vessel might be taken to another place for repair, the exception would not save the defendants. Nor can the provision as to the right to abandon for the amount of damage have reference or apply to repairs actually made. It is the estimate of repairs to be made, upon which the right of abandonment for a constructive total loss proceeds. After they were made, it would be too late to abandon. So that, looking at the intent and purpose of the parties, or adhering to the exact letter of the contract, the case of the plaintiffs is not within the exception.

2. The disposition of this question is a substantial disposition of the cause, unless, as the defendants suggest, the court were in

error as to the standard of repair. The presiding judge says, "completely and thoroughly repaired." The defendants say, the criterion in case of abandonment for constructive total loss is what it will cost to make the vessel seaworthy, capable of keeping the sea with cargo.

Upon an examination of the authorities cited by the defendants, we think they do not sustain this position, but, on the other hand, confirm the ruling of the presiding judge.

In *Sewall v. United States Ins. Co.* 11 Pick. 90, the court use the precise words, "thoroughly repaired."

In *Giles v. Eagle Ins. Co.* 2 Met. 140, a case of partial loss, the court held, that if a vessel receives a strain, which alters her shape so that she cannot be perfectly repaired without rebuilding her, and her value is thereby diminished, the underwriters are answerable for such diminished value, in addition to the expense of repairs, although the vessel is made seaworthy by such repairs.

The rule stated by Arnould, upon which the defendants seemed to rely, has reference to cases where the expense of repairs is increased by the decayed state and age of the ship. There the rule is, that if such ship can be repaired so as to keep the sea, at a cost less than her repaired value, the assured cannot elect to abandon because, owing to her decayed condition, the expenses of complete repairs would be greater than this. 2 Arnould on Ins. § 389.

In the section cited from Mr. Phillips, he only states, that the practicableness of repairs at the port of disaster is not conclusive as to the right to sell, instead of repairing; but if the vessel is in a reparable condition, and can there be so repaired as to be seaworthy to take another cargo, or return in ballast to the home port, by expense and sacrifice on the whole, including the home passage, not exceeding half its value, the loss is not total. The only difficulty is, that he says nothing of the finishing of repairs at the home port. 2 Phil. Ins. § 1572.

To repair is to put the vessel substantially *in statu quo*, with the qualification of the allowance of new for old; to restore what has been lost by the disaster. And the insured is entitled to

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entire repairs, to entire restoration. No intimation was given to the jury that these repairs were to have reference to defects not caused by the disaster.

The underwriter is responsible for the repair or restoration of the damaged or destroyed part of the ship, with materials, workmanship, style and finish corresponding to its original character. 2 Phil. Ins. § 1428.

3. In regard to the abandonment, no question seems to have been made at the trial, except that under this form of abandonment it was not competent for the plaintiffs to rely upon the amount of damages or cost of repairs, but only upon the impracticability of making the repairs at that place.

If this were so, upon the view stated of what is the just standard of repair, the case finds that it was impracticable to have the vessel repaired at San Francisco. In other respects we are not able to see any defect in the abandonment. It states the stranding, the putting on shore, and the impracticability of repair; and the facts support it. No objection is made to the form, nor is any apparent.

4. That the cost of taking the vessel round to New York ought to be included, in the estimate of repairs upon which an abandonment could be founded, is well settled.

Judgment on the verdict for the plaintiffs.

JOSIAH Q. LORING vs. MANUFACTURERS' INSURANCE COMPANY.

A mortgagee of real estate, to whom a policy of insurance thereon is made payable in case of loss, is not the assignee of the policy, and is affected by subsequent acts of the assured. A policy of insurance, made to the owner of a mill, upon "his interest, being one half" thereof, provided that if the property should be sold or conveyed, in whole or in part, the policy should become void, but that the policy "might continue for the benefit of such purchaser, if the company give their assent thereto, to be evidenced by a certificate of the fact, or by indorsement on this policy." The assured afterwards obtained another policy from the same company on "his interest, being three tenths" of the same mill; and then sold the whole property, and assigned the second policy to the purchaser, by an indorsement thereon, which recited that he had "sold the within insured property" to him, and was assented to in writing by the company. *Held*, that this assent was not a

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sufficient certificate of the fact of sale, to continue the first policy in force; and that oral evidence that the sale of the whole property was disclosed to the company before their assent to the indorsement upon the second policy was inadmissible to support an action on the first policy.

DEWEY, J.* This is an action on a policy of insurance made on the 11th of June 1853 to Charles Beaumont in the sum of four thousand dollars upon "his interest, being one half of the wooden steam saw mill situated in Hampden, Maine, formerly called the Mitchell mill." The plaintiff, at the date of the policy, had a mortgage on an undivided half of the mill. Indorsed on this policy was the following order, signed by Beaumont, and assented to in writing by the defendants' secretary: "June 12th 1853. In case of loss, pay the within to Josiah Q. Loring, Esq., to secure his mortgage." The mill having been destroyed by fire within the period for which the insurance was effected, and the payment in case of loss having been, by this written order, indorsed on the policy, directed to be made to the plaintiff, and assented to by the defendants, if nothing further was shown, this action would be maintained.

The defendants then urge in their defence, that this policy is wholly void, and that they are discharged from all liability thereon, the policy being subject to a condition set forth on the face of it, "that if the property insured shall be sold or conveyed, in whole or in part, the risk shall cease, and the policy shall become void." It appears by the facts stated in the report of the case, that on the 8th of July 1853 Beaumont conveyed to Daniel B. Hinckley by deed of quitclaim all his interest in the saw mill, thus parting with all his interest in the property insured by this policy. This fact is admitted, and, if uncontrolled by the further facts in the case, is of course fatal to the plaintiff's right to recover in the present action. This policy was not assigned to the plaintiff, nor did it become an insurance on his interest as mortgagee, but the plaintiff had a mere written order to pay to him such sum as should become payable to Beaumont thereon. Such was the legal effect of the transfer of this policy

* BIGELOW, J. did not sit in this case.

as made by Beaumont. *Hale v. Mechanics' Mutual Fire Ins. Co.* 6 Gray, 169. The plaintiff has, therefore, to meet the case of a sale by Beaumont, and to control the effect of such sale as defeating this policy.

The plaintiff insists that he has a good and sufficient answer to this, upon the facts in the case, and under the provision in the policy, that in case of a sale of the property insured "the policy may continue for the benefit of such purchaser, if this company give their assent thereto, to be evidenced by a certificate of the fact, or by indorsement on this policy." And the further question is, whether the policy was, after the sale by Beaumont, continued in force under this provision. It will be seen that it might have been done in two modes:

1st. By an indorsement on this policy of the assent of the defendants to continue the same after the sale, for the benefit of the purchaser. But no such indorsement is found on this policy; the only indorsement thereon being the order already stated, assented to in writing by the company. This was previous to the sale to Hinckley, relied upon to defeat the policy, and has no allusion to such sale. It is therefore entirely insufficient as an indorsement on the policy of the assent of the defendants to continue such policy after the sale to Hinckley.

2d. If that consent of the company is shown in any legal form, it is in the other prescribed mode, namely, "by a certificate of the fact." This necessarily implies a written document signed by the defendants or their agent, or adopted by them, assenting to the continuance of the policy after the sale, and made in reference to the fact that such sale had taken place. Has any competent evidence been produced by the plaintiff of such certificate having been made?

This opens the inquiry as to the proceedings of these parties in relation to other policies made by the defendants to Beaumont, as to the same steam saw mill, and particularly that of the 18th of June 1853, for \$2,400, upon "his interest, being three tenths of the wooden steam saw mill, situated in Hampden, Maine, formerly called the Mitchell mill." On this policy are the following indorsements, each signed by Beaumont, and assented to

by the defendants' secretary: "18th June 1853. In case of loss, pay one thousand dollars of the within to M. P. Sawyer, Esq., to cover mortgage." "July 8th 1853. Having sold the within named property to Daniel B. Hinckley, of Bangor, I hereby assign and transfer to him the within policy, and in case of loss under the same, this company will please pay the same to him, first reserving the right of M. P. Sawyer to receive one thousand dollars."

This second indorsement on the policy of the 18th of June, it will be seen, constituted a full assent on the part of the defendants to continue that policy after the sale by Beaumont. As to the liability of the defendants upon that policy, no question is raised by them. The point in dispute here is, whether this indorsement on the policy of the 18th of June operates as an assent to the continuance of the policy of the 11th of June on a distinct interest in the same saw mill? Waiving other difficulties in the case, the question first arises as to what property is described in the indorsement on the policy of the 18th of June. The language is, "having sold the within insured property to Daniel B. Hinckley." Looking at the mere question of identity of property here described as sold to Hinckley, the inquiry would be what property is described as sold? Is it three tenths of the saw mill, or the whole saw mill? That must be settled, as it would seem, by reference to the policy on which the indorsement is made. It is said to be "the within insured property." Upon turning to the policy, the property insured in the policy was only three tenths of the steam saw mill. That was all that was embraced in "the within insured property," and when the sale to Hinckley is stated, it is thus limited therefore, and the continuance of that policy, and assent thereto, are alone signified. Whether considering the effect of this indorsement either as a question of notice or of sale, or assent thereto, we can only read it as a recital of a sale of three tenths of the steam saw mill. The language is limited to that, and we can go no further than to give its natural and obvious construction.

Whether, if it could be read as a notice of the sale of the whole, such notice, without assent of the defendants to continue

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the policy as to the other portion previously insured, could avail, would certainly present a serious, and probably insuperable difficulty ; as it is the assent of the defendants to the continuance of the policy, after they are notified of the sale, that continues the policy for the benefit of the purchaser. There is nothing anywhere to signify the assent of the defendants to continue any other policy than that of the 18th of June, which was upon a distinct three tenths of the saw mill. In the opinion of the court, this recital of the sale, and assent to a continuance of the policy, must be restricted to the three tenths of the saw mill insured in that policy ; which of course excludes the one half of the saw mill insured by the previous policy, on which this suit is brought, and the only one with which the plaintiff has any connection or interest. Upon the paper documents and proofs resulting therefrom, the plaintiff has failed to show that the defendants assented to the continuance of the policy of the 11th of June.

The plaintiff then proposes to show by parol evidence that the defendants, at the time of the making of the indorsement on the policy of the 18th of June, in fact had notice that Beaumont had conveyed all his interest in the entire saw mill to Hinckley, and that the policy of the 11th of June, and that of the 18th of June were both presented and assented to, as to their respective indorsements, at the same time. This fact of knowledge of the sale of the whole interest is denied by the defendants, and evidence is offered on their part tending to rebut the plaintiff's evidence, and also to disprove the fact of the policy of the 11th of June having been presented to them at the time when their assent to a continuance was entered on the policy of the 18th of June. If these facts thus relied upon by the plaintiff, to show knowledge by the defendants of the sale of the entire saw mill to Hinckley at the time of making the indorsement of the 8th of July upon the policy of the 18th of June, were material, it was agreed by the parties that the evidence upon that point should be submitted to a jury. But in our opinion such evidence would be incompetent to show the fact of assent to the continuance of the policy of the 11th of June, after the sale to Hinckley. The defendants had the right to stipulate, for their greater security

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against the errors of treacherous memory, or the greater evils of false oral statements by witnesses, that the evidence of such assent should be wholly in writing, either indorsed on the policy, or by a written certificate issued by them. The assured being a party thereto, is bound by that provision in the policy; and the plaintiff, in seeking to enforce payment for a loss under this policy, must show the assent to a continuance of the policy, after the sale to Beaumont, in the manner stipulated in the policy, "by a certificate of the fact, or by indorsement on the policy." Numerous cases might be cited to this effect, but the law is too well settled to require it. Upon the ground taken by the defendants, they have maintained their defence, and are not legally liable in this action.

Judgment for the defendants.

G. W. Phillips, for the plaintiff.

R. Fletcher & C. A. Welch, for the defendants.

JEFFERSON KIMBALL & others vs. HOWARD FIRE INSURANCE
COMPANY.

Upon the face of a policy were printed provisions that in case the assured already had other insurance on the property, not notified to the company and mentioned in the policy, this policy should be void; and that if subsequent insurance should be obtained, and not notified to the company and indorsed upon the policy, the policy should cease. Held that a clause inserted in writing upon the face of the policy, in these words, "other insurances permitted without notice until required," applied to prior as well as to subsequent insurances; and that a previous policy did not therefore avoid this one; but, if it contained similar printed clauses, was itself made void by the obtaining of this one, without any vote or adjudication by the previous insurers that the property was over insured and an election by them to cancel their policy; although they by their policy reserved the right to cancel it in case of any subsequent insurance which, with theirs, should in their opinion amount to an over insurance.

A notice by the assured to the agent of an insurance company, of the assured's intention to procure subsequent insurance upon the same property, is not evidence of a compliance with a provision in the first policy requiring any subsequent insurance to be made known to the first insurers and indorsed upon the policy or otherwise acknowledged in writing by them.

The question whether reasonable diligence has been used in communicating a subsequent insurance to the first insurers, when all the facts are agreed, is a question of law for the court.

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Seven months is an unreasonable delay in giving notice of a subsequent insurance to previous insurers whose policy expressly required the assured to give such notice "with reasonable diligence."

A policy of insurance against fire, issued by a stock company, in consideration of an entire premium, for one sum upon a stock of goods, and for an additional sum upon the fixtures in the same shop, and stipulating that in case of any subsequent insurance "on the same property," without a certain notice and acknowledgment, "this policy shall cease, and be of no further effect," is wholly avoided by such a subsequent insurance on the goods only.

ACTION OF CONTRACT upon a stock policy, whereby the defendants, in consideration of one premium, insured the plaintiffs \$5,700 on their stock of goods, and \$300 on fixtures in the same shop, and on the face of which were printed the three clauses following: "Provided further, that in case the assured shall have already any other insurance against loss by fire, on the property hereby insured, not notified to this company and mentioned in or indorsed upon this policy, then this insurance shall be void and of no effect. And if the said assured, or their assigns, shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this company, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease, and be of no further effect. And if any subsequent insurance should be made upon the property hereby insured, which, with the sum or sums already insured, should, in the opinion of the said Howard Fire Insurance Company, amount to an over insurance, said company reserve to themselves the right of cancelling this policy, by paying to the insured the unexpired premium *pro rata*."

Answer, a policy for \$4,000 subsequently obtained by the plaintiffs upon the same stock of goods, and not notified to the defendants, or indorsed upon the policy in suit, or acknowledged by them in writing. Upon the face of the second policy was written, "other insurances permitted without notice until required;" and there were printed clauses precisely like the two first of the three above quoted from the policy in suit.

Trial before *Bigelow, J.*, who made a report thereof to the full court, so much of which as is material to the understanding of the points of law decided is stated in the opinion.

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B. F. Brooks & J. D. Ball, for the plaintiffs.

H. F. Durant & B. Dean, for the defendants.

BIGELOW, J.* 1. At the time of the loss by fire, the plaintiffs had two policies of insurance on their stock of goods ; one issued by the defendants, bearing date April 2d 1851, and the other by the Hudson River Fire Insurance Company, dated April 19th 1851. The former contains the following stipulation : " If the assured or their assigns shall hereafter make any other insurance on the same property, and shall not, with all reasonable diligence, give notice thereof to this company, and have the same indorsed on this instrument, or otherwise acknowledged by them in writing, this policy shall cease, and be of no further effect." There was no notice given to the defendants of the existence of the second policy until the 19th of November 1851, after the stock of goods had been destroyed by fire.

Upon these facts, it is quite clear that the decision of the case depends on the validity of the second policy. If it was valid, then, by the express terms of the contract with the defendants, their liability as insurers ceased ; if, on the other hand, it was for any reason invalid, so that it was not a binding contract on the company by whom it was issued, then there was no subsequent insurance on the property, and the plaintiffs are entitled to recover. To this extent the authorities are clear and decisive. *Jackson v. Massachusetts Mutual Fire Ins. Co.* 23 Pick. 418. *Clark v. New England Mutual Fire Ins. Co.* 6 Cush. 342. *Barrett v. Union Mutual Fire Ins. Co.* 7 Cush. 175. *Forbes v. Agawam Mutual Fire Ins. Co.* 9 Cush. 470.

The plaintiffs contend that the second policy never became an operative contract, because it contained a proviso that it should be void and of no effect, if the assured " shall have already any other insurance against loss by fire on the property hereby insured, not notified to this corporation, and mentioned in or indorsed upon this policy," and because it does not appear that any such notice was given to the Hudson River Company of the existence of the prior policy, which the plaintiffs seek to

* METCALF, J. did not sit in this case.

enforce in this action. This would be a sound argument, if there was nothing in the second policy to vary or control the effect of this proviso. But there is a written clause, which we think was intended to annul the usual printed formula as to prior and subsequent insurance, and which, rightly construed, must be held to have that effect. It is in these words: "Other insurances permitted without notice until required."

The plaintiffs, however, seek to limit the operation of this stipulation, so that it shall apply only to policies of insurance subsequently made upon the property insured. But there are decisive objections to this construction. The words are general, and must be held to have a general application. It is "other," not "further" or "future" insurance, which is permitted without notice. In other parts of the policy, when a distinction is intended to be made between prior and subsequent insurance, it is carefully marked by apt words, which clearly indicate to which of the two reference is made. Besides; by the printed clause it was required of the assured that he should give notice to the company of both prior and subsequent insurance. When by a written clause, to which, as expressing the recent and more immediate intent of the parties, we are to give greater effect than any stipulation in the usual printed form, it is provided, that notice of other insurance need not be given, it must be inferred that it was the purpose to dispense with that provision of the contract which otherwise required the assured to give notice of all insurance on the property, whether prior or subsequent to the date of the policy. The second insurance obtained by the plaintiffs was not therefore rendered invalid by failure to notify the company of the previous policy on the property. It was a valid subsisting insurance, and the failure of the plaintiffs to give notice thereof to the defendants avoided the policy declared on in this action.

2. It was urged by the plaintiffs that, if the second policy was valid, their contract was not thereby rendered void, because there was no vote or adjudication by the defendants that the property covered by the insurance was over insured and no election by them to cancel the policy issued to the plaintiffs. This

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argument is founded on that clause in the policy which provides that "if any subsequent insurance should be made upon the property hereby insured, which, with the sum or sums already insured, should, in the opinion of the said Howard Fire Insurance Company, amount to an over insurance, said company reserve to themselves the right of cancelling this policy, by paying to the insured the unexpired premium *pro rata*."

But this provision had no reference to insurance on the property, procured without notice to the defendants and without their assent. It was inserted *alio intuitu*. The manifest purpose was to give to the defendants the right to annul the policy at any time when the insurance on the property of which they had notice, and to which they had assented, together with the amount insured by themselves, was so great as, in their opinion, to constitute an over insurance on the property covered by the policy. This was an important right to the defendants, especially when insurance was made on a stock of goods which might at any time become greatly reduced in value, and thereby the temptation to cause a fraudulent loss be very much increased.

3. The evidence offered of the notice given to the agent of the defendants, of an intention by the plaintiffs to procure other insurance, was wholly immaterial. If it could have full effect as a notice to the defendants, it would not prove a compliance with the stipulations in the policy which required actual notice of the subsequent insurance, after it was obtained, and an indorsement of it on the policy, or a written acknowledgment thereof from the defendants. *Worcester Bank v. Hartford Fire Ins. Co.* 11 Cush. 265. *Hale v. Mechanics' Mutual Fire Ins. Co.* 6 Gray, 173. *Loring v. Manufacturers' Ins. Co.* ante, 32, 33.

4. Nor can the plaintiffs, by the notice given after the destruction of the property by fire, and seven months subsequently to the date of the second policy, be deemed to have made known the fact of the subsequent insurance to the defendants seasonably. When the facts are not in dispute, it is the province of the court to determine, as a question of law, what is reasonable diligence. *Wheeler v. Field*, 6 Met. 295. *Prescott Bank v. Caverly*, 7 Gray, 221. Under the circumstances of this case, it was clearly

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the duty of the plaintiffs to have given to the defendants immediate notice of the existence of the second policy.

5. The omission of the defendants to comply with the stipulations in their policy, requiring them to give notice to the defendants of the subsequent insurance, is fatal to their whole claim under the policy. They cannot therefore recover for the loss on fixtures, although not included in the subsequent insurance. The contract is, that if the assured fail to give the notice required, the policy shall cease and be of no further effect. The entire contract was therefore terminated. *Lee v. Howard Fire Ins. Co.* 3 Gray, 594.

Judgment for the defendants.

BOWDITCH MUTUAL FIRE INSURANCE COMPANY vs. ISAAC WINSLOW & others.

An application to a mutual fire insurance company for insurance on buildings contained the following question and answer: "State whether or not incumbered, to whom, and to what amount:" "Mortgaged for \$2,000 on the buildings, land, &c.—value \$7,000;" and concluded with an agreement of the applicant "that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk; and in case of insurance he holds himself bound by the act of incorporation and by-laws of the company." The policy was also made subject to the provisions and conditions of the by-laws; and one of the by-laws provided that the policy should be void, unless the true title of the assured should be expressed in the application. The policy also expressed the intention of the company to rely on their lien on the interest of the insured in the buildings and the land under the same. At the time of the application, the land on which these buildings stood, and a larger piece of land, owned by the same person, but separated by a court laid out between them by the owner, were both subject to a mortgage for \$2,000 to J. S., and to another mortgage for \$800 to another party; and the value of the first piece of land and buildings was \$7,000. The assured afterwards indorsed upon the policy an assignment reciting his "having mortgaged the property within mentioned to J. S." and assigning the policy to him as collateral security; and the company assented in writing to this assignment. *Held*, that the failure to disclose the mortgage for \$800, in the original application, avoided the policy in the hands of the assignee.

WRIT OF REVIEW. The original action was assumpsit upon a policy of insurance, dated June 16th 1847, by which the plaintiffs in review insured Joseph Morrill \$1,600 upon his soap and candle shop, fixtures, stock and tools, in Roxbury, "subject to

the provisions and conditions of the charter and by-laws of said corporation, and the lien on the interest of the person insured in any building covered by this policy, and the land under the same," which lien the company expressed in the policy their intention to rely on, to secure the payment of assessments.

Indorsed upon the policy was the following assignment: "Having mortgaged the property, real and personal, within mentioned, to Isaac Winslow & Sons, merchants of Boston, I hereby assign to them or their assigns the within policy, to hold as collateral security for the performance of the condition of said mortgage Dated at Boston, July 16th 1847. Joseph Morrill.

"The directors consent. John T. Burnham, Secretary."

Among the by-laws were the following: "ART. 9. If the insured shall neglect for the space of ten days, when personally called on, or after notice in writing left at his last and usual place of abode or business, to pay any assessment, the risk of the company on the policy shall be suspended till the same is paid."

"ART. 11. When any property insured shall be alienated by sale or otherwise, the policy shall thereupon be void, and be surrendered to the directors to be cancelled; but if the grantee or alienee have the policy assigned to him, he may, upon application to the directors, within thirty days next after such alienation, on giving proper security, have the same ratified and continued in force for his benefit, with all the rights, and subject to all the liabilities, to which the original party insured was entitled and subjected: Provided, that such alienation shall not affect the rights of any person to whom the policy shall be payable, or be assigned as collateral security, if such person shall have assigned a premium note with the assured, or shall give such security as the directors require."

"ART. 17. Any policy issued by this company shall be void, unless the true title of the assured be expressed in the proposal or application for insurance."

"ART. 19. The applicant for insurance shall make a true representation of the property on which he requests insurance, so

far as concerns the risk and value thereof, and of his title and interest therein."

The application (which was made part of the policy) contained, among others, the following question and answer: "State whether or not incumbered, to whom, and to what amount." Answer. "Mortgaged for \$2,000 on the buildings, land, &c.—value \$7,000." And the application concluded with the following clause: "The said applicant hereby covenants and agrees to and with said company, that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk; and in case of insurance he holds himself bound by the act of incorporation and by-laws of said company."

The parties submitted the case to the court upon a statement of facts, of which the policy, assignment, charter and by-laws, and application were made parts, and the material part of the residue of which was as follows:

"At the time of the application for insurance, the premises were owned by Joseph Morrill, and were subject to a mortgage to the plaintiffs for \$2,000, and also to an earlier mortgage to the Traders' Bank for \$800. But both these mortgages covered four lots of land, two on the northwesterly side of High Street Court, containing 3,291½ feet, and two on the opposite side of said court, containing 4,260½ feet, entirely separated by said court from the two lots first mentioned. The buildings insured stood on the first two lots only, and were built after the making of the mortgage to the Traders' Bank, and before the making of the other mortgage; and the value of said two lots and buildings thereon was \$7,000. The four lots have never been conveyed separately, but have always been owned together, and originally constituted one lot, through which High Street Court was laid out by the owner before either of said mortgages was made. The mortgage to the Traders' Bank remained in force till the time of the fire, and under it the bank took possession for the purpose of foreclosure after the making of the policy."

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"The directors of the company did not, either at or since the time of assenting to the assignment of the policy to the defendants in review, claim of them any premium note or other security, and the said defendants have never given any such note or security.

"More than ten days before the fire, an assessment was laid, and notice thereof given to Morrill, and he agreed to pay it, if the agent of the company would call upon him on a certain day, which happened to be the day on the night of which the fire occurred. He called accordingly, and did not find Morrill. That night the fire happened. The next morning Morrill paid the assessment. The defendants in review did not know of the assessment, and were never asked to pay it.

"If, on the foregoing facts, a jury would be warranted in finding a verdict for the defendants in review, in this action, brought in their names, judgment is to be rendered for them and the case referred to an assessor to settle the amount of damages; otherwise, judgment to be entered for the plaintiffs in review, and the former judgment reversed."

O. P. Lord, for the plaintiffs in review.

H. Gray, Jr. for the defendants in review. *I.* The assignment of the policy, with the assent of the insurance company, to the Winslows, who had an insurable interest in the property, created a new contract between the insurers and the Winslows, upon their interest in the property. *Fogg v. Middlesex Mutual Fire Ins. Co.* 10 Cush. 345, 346. *Foster v. Equitable Mutual Fire Ins. Co.* 2 Gray, 219. *Clark v. Citizens' Mutual Ins. Co.* Middlesex, 1853. The Winslows may therefore maintain this action in their own names. *Kingsley v. New England Mutual Fire Ins. Co.* 8 Cush. 393. *Phillips v. Merrimack Mutual Fire Ins. Co.* 10 Cush. 353. After such new contract, the Winslows were the insured, within the meaning of the 9th by-law; and their rights could not be affected by the subsequent failure of Morrill to pay an assessment, no demand for which had been made on them; nor by the fact that they never gave a deposit note, inasmuch as no such note was ever required of them by the company. *Clark v. Citizens' Mutual Ins. Co.* Middlesex,

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1853. *Wilson v. Hill*, 3 Met. 69. *Tillou v. Kingston Mutual Ins. Co.* 7 Barb. 573, and 1 Seld. 408. *Flanagan v. Camden Mutual Ins. Co.* 1 Dutcher, 513. *Durar v. Hadson County Mutual Ins. Co.* 4 Zab. 194-199, 203. *New England Mutual Fire Ins. Co. v. Butler*, 34 Maine, 454.

II. The failure to disclose the mortgage to the 'Traders' Bank for \$800 was not such a misrepresentation as makes void the contract of insurance with the Winslows; and this on three independent grounds:

(1.) The failure to state the name of the mortgagee, in the answer respecting incumbrances, in the application, cannot now be objected to, after the insurers have accepted that answer, and issued a policy thereon. *Buffum v. Bowditch Mutual Fire Ins. Co.* 10 Cush. 543. *Strong v. Manufacturers' Ins. Co.* 10 Pick. 45. *Gates v. Madison County Mutual Ins. Co.* 2 Comst. 47, 48. This was therefore a policy on the interest of the assured, subject to a mortgage of not more than \$2,000 to some person other than the assured; for if it was less, the assured cannot complain. *Liscom v. Boston Mutual Fire Ins. Co.* 9 Met. 205. The new contract with the Winslows was therefore valid, whatever may have been the validity of the original contract with Morrill.

(2.) It is sufficient if the representations as to incumbrances, in the application, are substantially correct. *Houghton v. Manufacturers' Mutual Fire Ins. Co.* 8 Met. 114. *Underhill v. Agawam Mutual Fire Ins. Co.* 6 Cush. 440. *Liscom v. Boston Mutual Fire Ins. Co.* 9 Met. 205. *Buffum v. Bowditch Mutual Fire Ins. Co.* 10 Cush. 540. *Allen v. Charlestown Mutual Fire Ins. Co.* 5 Gray, 384. *Clapp v. Union Mutual Fire Ins. Co.* 7 Foster, 143. *Dunstable Baptist Society v. Hillsborough Mutual Fire Ins. Co.* 19 N. H. 580. And as much of the \$2,800 of incumbrances was disclosed as belonged to those two, (out of the four lots mortgaged,) on which the property insured stood. *Brown v. Worcester Bank*, 8 Met. 51. Rev. Sts. c. 37, § 37. *Stevens v. Cooper*, 1 Johns. Ch. 430.

(3.) The application, being expressly made part of the policy, is to be construed as if the two were moulded into one instru-

ment. *Burritt v. Saratoga County Mutual Fire Ins. Co.* 5 Hill, 191. Morrill's covenant in the application, as to the truth of the representations, was limited to those "material to the risk." This limits the more general stipulation in the 17th and 19th by-laws annexed to the policy. *Line v. Stephenson*, 5 Bing. N. C. 183, and 4 Bing. N. C. 678. The additional mortgage was clearly not material to the risk.

The further covenant that, "in case of insurance, he holds himself bound by the act of incorporation and by-laws of said company," must be construed to mean "in case of valid insurance." *Jackson v. Massachusetts Mutual Fire Ins. Co.* 23 Pick. 423. *Clark v. New England Mutual Fire Ins. Co.* 6 Cush. 347-353. Clauses introduced for the benefit of the insurers are to be continued most strongly against them. *Palmer v. Warren Ins. Co.* 1 Story R. 364. *Wall v. Howard Ins. Co.* 14 Barb. 385, 386.

DEWEY, J. Assuming that by force of the assignment to the Winslows by Morrill, with the assent thereto of the plaintiffs in review, the action was properly brought in the name of the Winslows, the further inquiry is as to the sufficiency of the defence to the original action. This is placed upon two grounds, first, the false representation of Morrill, in his application for a policy, as to the extent of the incumbrances upon the property; secondly, a failure on the part of Morrill to pay an assessment upon his policy, within the time specified in the by-law, whereby the policy was forfeited, and the company discharged from further liability. As to the second ground of defence, it arises upon facts happening after the assignment of the policy to the Winslows, and it is contended on their behalf, that the Winslows are not properly chargeable therefor, the neglect being that of Morrill only, and there not having been any demand upon them for the payment of the assessment. Whether this position can be maintained, we have not found it necessary particularly to consider; for, whatever may be the rule of law as to the effect of a violation of the by-laws or stipulations in the policy, after the assignment by Morrill, we suppose no doubt can exist as to the right of the insurance company to show that this

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policy was defeated by reason of misrepresentations of the assured made in his original application for the policy. This assignment transferred the policy of Morrill only. It did not profess to create a new policy. The Winslows assumed no responsibility to the insurance company, gave no new deposit note to the company, nor any guaranty of Morrill's note; in fact, did nothing more than to succeed to Morrill's right and interest in the policy, whatever those might be. The question is, virtually, whether as a policy to Morrill there exists a valid defence to it.

It now appears that there was in the original application of Morrill a material misrepresentation as to the extent of the incumbrances upon the property. In answer to the direct inquiries as to whom and to what amount it was mortgaged, it was stated to be mortgaged for two thousand dollars. It was in fact mortgaged not only for the two thousand dollars, but in a distinct mortgage for the further sum of eight hundred dollars. This false statement as to the incumbrances, in answer to a direct question, under the repeated decisions of this court, and as it seems also to have been held in reference to this particular case, upon the hearing of the petition for review, renders the policy invalid. *Bowditch Mutual Fire Ins. Co. v. Winslow*, 3 Gray, 431, and cases cited. It was invalid originally in the hands of Morrill, and equally so in the hands of the party claiming under him.

In answer to this, it is now urged that after the assignment to the Winslows this objection was obviated, as the assignment recites that "having mortgaged the property within mentioned to Isaac Winslow & Sons, I hereby assign to them or their assigns the within policy, to hold as collateral security for the performance of the condition of said mortgage." It is true that after this transfer to the Winslows, the policy was held by the persons who were the mortgagees in the two thousand dollar mortgage. Except as to those authorized to receive the avails of this policy in case of loss, there was no other outstanding mortgage than the eight hundred dollar mortgage to the Traders' Bank. But we do not see how this changes the aspect of the case, or removes the objection. The recital as to the mortgage to the Wins-

lows was only a restatement of what had been stated in the original application, and the assignment of the policy did not discharge that incumbrance or lessen the whole amount of incumbrances on the property insured. As already remarked, the Winslows did not by this indorsement take a new policy as mortgagees, but a transfer of Morrill's interest in the policy he had obtained.

It is further urged that the falsity of the representations of Morrill ought not to affect the policy, unless material to the risk, and that the value of the property insured was so large, that the omission of the eight hundred dollar mortgage was not material to the risk. But this is no sufficient answer, as the party applying for the policy was bound, in answering the interrogatories, to answer truly; and having made a false statement in this respect, he has thereby rendered the policy of no effect. This seems to us to have been distinctly ruled in the former decision of the court in this case. 3 Gray, 432. We see nothing in the present aspect of this case to lead us to change the opinion there expressed; and the result is therefore that the original action against the company cannot be maintained, and there must be

Judgment for the plaintiffs in review.

SARAH E. SHAW vs. BOSTON & WORCESTER RAILROAD CORPORATION.

In an action brought by a wife, after the death of her husband, against a railroad corporation, for injuries occasioned to her by their locomotive engine, while travelling in the highway with her husband in a vehicle driven by her, his declarations, made in her absence, as to the cause and circumstances of the accident, and his previous knowledge of the disposition of the horse, and his statements showing that knowledge, are inadmissible in evidence for the defendants.

In an action against a railroad corporation for injuries occasioned by their locomotive engine to a traveller in the highway at a place where the county commissioners had authorized the corporation, upon certain conditions, to cross upon a level, the record of the county commissioners, stating that in their opinion no flagman at the crossing was necessary, is not competent evidence of due care on the part of the corporation.

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In an action against a railroad corporation for injuries sustained by collision with their locomotive engine at a railroad crossing, the plaintiff contended that the defendants had been guilty of negligence in omitting to have a flagman there to give notice of the approach of the train; the jury were instructed "that it was the duty of the plaintiff to satisfy the jury that this was a necessary, reasonable and proper precaution, in the exercise of ordinary care on their part, at the place, time and under the circumstances proved at the time of the accident; and that, although the defendants had complied with all the requirements of the statutes, this would not exempt them from liability, if they had omitted other precautions, which, in the exercise of due and ordinary care, they were bound to take, at the time, place and under the circumstances of the accident, the omission of which proper precautions was the efficient cause of the injury to the plaintiff." *Held*, that the omission of the judge to distinguish between circumstances which could be reasonably anticipated, and those in their nature extraordinary, but which would make unusual precautions proper, if they could have been foreseen, entitled the defendants to a new trial.

In an action against a railroad corporation for a personal injury, an averment in the declaration, that the plaintiff was struck by their locomotive engine while travelling in the highway, is not sustained by proof that, by means of the defendants' negligence in the management of their train, the plaintiff's horse was frightened, and ran or was driven out of the highway, five or six rods before reaching the railroad crossing, upon land owned by the defendants, and the plaintiff was there struck, while attempting to cross the railroad. And the declaration cannot be amended after verdict, so as to cure this variance.

The degree and measure of care due from a railroad corporation and from a traveller in the highway, at a railroad crossing, are precisely the same; being those which men of ordinary sense, prudence and capacity would take under like circumstances in the conduct and management of their respective vehicles.

In an action by a traveller in the highway against a railroad corporation, for injuries sustained by collision with their locomotive engine at a railroad crossing, the presiding judge instructed the jury, "that the plaintiff was bound to use ordinary care in the conduct and management of his vehicle in the highway, and in the approach to and passage of the crossing; and the defendants were bound to use reasonable care in the conduct and management of their engines and trains, the manner and extent of which would be such care in the management of their engines and trains as would be sufficient to enable a traveller upon the highway, who used ordinary care, there to pass over the crossing in safety." *Held*, that these instructions were objectionable, as implying that proof of due care on the part of the plaintiff would of itself show that the defendants were in fault.

In an action by a woman against a railroad corporation for personal injuries occasioned to her by their locomotive engine, the death of the plaintiff's husband by the same accident, or the fact that she has dependent children, is not admissible in evidence to increase the damages.

In an action for damages against a railroad corporation by a woman who, by being struck by their locomotive engine, had lost one arm and the use of the other, and been otherwise much bruised and injured, so as greatly to impair her health and memory, and put her in constant pain, the plaintiff, at different trials, obtained three verdicts, of \$15,000, \$18,000 and \$22,250, respectively, the two first of which were set aside for errors in the instructions of the presiding judge. The court refused to set aside the third verdict on the ground that the damages were excessive.

ACTION OF TORT for injuries sustained by the plaintiff, by reason of being struck by the defendant's locomotive engine. **Writ**

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dated July 29th 1852. *Ad damnum*, twenty five thousand dollars.

The plaintiff's declaration alleged that the defendants were a corporation, owning a railroad with branches extending into different towns upon its line, one of which extended through Newton to Needham, and was known as the Newton Lower Falls Branch; that they owned and ran at stated times a train or trains of cars over their principal road and said branch; "that on the 27th day of January A. D. 1852, as she, with her husband, the late George W. Shaw, and one other person, in a sleigh drawn by a horse, were travelling, with due care and foresight, over the turnpike road or highway, in said Needham, across which the said branch of railroad is constructed, and as they were crossing the track of said railroad branch, in said Needham, a train of cars, drawn by a steam engine at great speed, belonging to and run by the defendants, ran into and over the vehicle in which said plaintiff was riding; and threw, with great violence, producing a severe concussion, herself and her husband aforesaid upon the track of said railroad; and ran over them, and broke their limbs, causing the death of her said husband within a few hours thereafterwards, and breaking the arms of the plaintiff, and bruising her body and limbs; by reason of which serious injuries the plaintiff has lost the whole of her left arm, a part of her right hand, and the use of her right arm, and has sustained other great and permanent bodily injuries, and has suffered great distress of body and mind to the present time, and has been at great expense in consequence of the same. And the plaintiff says, the defendant corporation were guilty of great negligence and carelessness; and that in consequence of said negligence and carelessness she, the said plaintiff, and her said husband were run over and injured as aforesaid. And the plaintiff further says, that the said corporation gave no proper and legal notice of approach and passing of their said train of cars across the said highway, at the time of said injuries; nor did they give any legal or proper caution to travellers, of the existence of said railroad crossing; and took no proper precaution to warn travellers of the approach of said train, and to protect

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them from harm and injury, as was their duty to do; that the said train of cars was run across said highway at an unusual and dangerous speed, and to a point much further than usual or necessary, by reason of the carelessness and negligence of the defendants' servants; and that the defendants were guilty of great carelessness and negligence in the management of said railroad branch, and the trains run upon the same, in not giving notice and warning as aforesaid; in the great and dangerous speed at which said train was run across said highway at a dangerous point; and in not guarding properly against collision with those who were crossing said railroad over said highway; whereby the plaintiff was injured as aforesaid."

The answer admitted the defendant's incorporation, ownership of the railroad, running of trains thereon, and that their branch railroad crossed the highway, as alleged. It also admitted that the plaintiff, on the day alleged, was travelling with her husband in a sleigh along said highway, and that the sleigh came in collision with the defendants' locomotive engine and train of cars, and the plaintiff, by reason of such collision, was thrown from the sleigh and severely injured and bruised, and her arms broken; but alleged the defendants' ignorance, and left the plaintiff to prove, whether the collision happened on the highway, whether the engine and cars ran into and over the sleigh, and what damage, pain and loss the plaintiff sustained. It denied that the plaintiff was then and there travelling with due care and foresight, and alleged that the plaintiff was then and there guilty of negligence and carelessness in travelling, and that the accident happened and the damage was sustained by reason of such negligence and carelessness; denied that the engine and cars were drawn or moved at great speed, and alleged that they then and there moved at a moderate and reasonable speed; and denied that the defendants were guilty of any neglect or carelessness in the management of their train, or in the omission to give all reasonable, proper and legal notice of the approach and passing of the train across the highway, or of the existence of the railroad crossing, or in the omission of any other care or duty legally incumbent on them, whereby the

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plaintiff had suffered the alleged injuries, in the management of the defendants' said railroad, or the condition or construction thereof.

At the trial at March term 1854, before *Bigelow, J.*, it appeared that the plaintiff, at the time of the accident, which was late in the evening, was riding in a sleigh, with her husband and another person, a female; that the plaintiff sat on the front seat and was driving, and the others sat behind; that after the disaster the plaintiff and her husband were taken up, both severely injured, and carried into separate apartments of the railroad station, which was close by, where they remained until they were carried home; and that the husband died early the next morning in consequence of his injuries.

The defendants offered in evidence the declarations of the husband, concerning the cause and circumstances of the accident, made by him while in the station; but as they were not made in the presence or hearing of the plaintiff, they were rejected.

Much conflicting evidence concerning the character and disposition of the horse was introduced and submitted to the jury; and the plaintiff admitted that they were well known to her and her husband to have been such as they were proved to have been, inasmuch as her husband had owned the horse for two years before the accident. The defendants offered to show, that "some time prior to the accident certain statements, concerning the character of the horse which the plaintiff was driving at the time of the accident, were made by a witness to the plaintiff's husband." But it appearing that the plaintiff was not present when such statements were made, and there being no proof of their having been ever communicated to her, they were rejected.

The defendants offered in evidence a record of the proceedings of the county commissioners of Norfolk at September term 1846, by which, upon the petition of the defendants, concurred in by the selectmen of Needham, for leave to construct their branch railroad so as to cross said highway upon a level, with out being required to erect any gate across their road at the crossing, or to exhibit any flag at the times of crossing, said

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commissioners, after a view and hearing, declared their "opinion that no injury, danger or inconvenience would result to the travel on said public highway, by reason of the railroad crossing the same on a level therewith, provided no passenger or freight house of said railroad should be placed nearer than one hundred feet of said public road;" and authorized the defendants so to cross, upon condition that they should not so place any such house; and added, "the commissioners do not deem it necessary, for the present, to require said railroad corporation to erect any gate, or exhibit any flag, as additional security to travellers on said public highway." But, the plaintiff having expressly waived any claim upon the ground of a failure of the defendants to comply with the requisitions of the county commissioners, the judge rejected this evidence; and, upon this point, instructed the jury that the plaintiff was precluded from any claim for negligence of the defendants, on the ground that the requirements of the commissioners and the selectmen, made under the statutes, had not been complied with.

The plaintiff introduced and relied on much evidence tending to show that the defendants were guilty of negligence at the time and place of the accident, by omitting to ring the bell on the engine, and to sound the whistle; by going at a very rapid speed; by failing to apply the brakes to the engine and cars in season; by neglecting to keep a proper lookout ahead for vehicles approaching on the highway; and not having a flagman or person in attendance at the crossing to warn travellers on the highway of the approach of the engine; that the crossing was peculiarly dangerous, owing to the sight being obstructed, as travellers on the highway approached, by the houses and buildings of the village, which rendered great precautions on the part of the defendants necessary, which were omitted; and that in these and other particulars the defendants were guilty of negligence. Much evidence was offered by the defendants to rebut and control this testimony, in all its particulars, and to show that great care was used at this crossing. And the jury were taken to view the crossing in question during the trial.

Upon this state of proof, the counsel for the defendants re-

quested the following special instructions: "That the statute law having prescribed the ringing of the bell as the warning to travellers at highway crossings, and provided other specific provisions for their security if that should be insufficient in the opinion of public officers appointed to act upon that question, the ringing of the bell at this crossing was all that was required by law, unless there was something peculiar to it, which rendered another mode of notice necessary; and that the burden is on the plaintiff to show such peculiarity, and that it was such as created a difficulty in hearing a bell at a reasonable distance.

"That the statute law having placed the power of providing certain and perfectly safe precautions, for the protection of travellers at crossings, in the hands of public servants elected by the people in the neighborhood of said crossings, to be constructed at the expense of the railroad corporations, provided that the ringing of the bell should not be considered sufficient by such public servants; and this road having been in operation at that time for six years; and there being no proof that any complaint had been made that the ringing of the bell was not sufficient; and no requisitions having been made by the public servants for any further precautions; the legal presumption is, that no other precautions were necessary, and the burden of proof is on the plaintiff to prove that some other was ordinarily necessary.

"That the statute law having placed it in the power of public servants to determine upon the necessity of erecting gates at railroad crossings, and to dispense with the erection of them, and there being no proof that any such requisition had been made upon the defendants to erect a gate, the want of one, or of any substitute for one, cannot be accounted negligence.

"That, to render the defendants liable in the action, they must be proved guilty of negligence, or want of ordinary care or diligence, in the omission of proper precautions at this crossing—the want of such care and diligence as are usually exercised in like cases; and therefore that, to find the defendants guilty of negligence in omitting to have a flagman stationed there, or in the omission of any other precaution, the jury must be satisfied that such precautions were ordinarily used at railroad crossings

like this; and that, unless it is satisfactorily proved that such precautions were ordinarily used under like circumstances at that time, the plaintiff is not entitled to recover."

But the court refused to give the instructions asked for, and instructed the jury as follows: "That the burden of proof was on the plaintiff to satisfy the jury, by the clear weight and full preponderance of the proof—the preponderance of probabilities merely not being sufficient—that the defendants had been guilty of negligence and want of ordinary care, (which were defined and illustrated in a manner to which no exception was taken;) that this was a question of fact, to be determined by them upon the whole evidence in the case, including their own observation at the view; that if, from the difficulty of hearing the bell or seeing the train at a reasonable distance, or from other causes, as disclosed by the testimony, the defendants had been guilty of a want of due and reasonable care, by omitting such warnings and precautions as persons of ordinary care, under like circumstances, would and ought to use, and thereby caused damage to the plaintiff, she would be entitled to recover; that the plaintiff did not claim damages by reason of negligence in the defendants in not having a gate at this crossing, having expressly waived it; but she did claim that the defendants were guilty of negligence, in omitting to have a flagman there to give notice of the approach of the train; that on this point it was the duty of the plaintiff to satisfy the jury that this was a necessary, reasonable and proper precaution, in the exercise of ordinary care on their part, at the place, time and under the circumstances proved at the time of the accident; that the question for the jury to determine was not as to what other railroads had, or might, or ought to have done at different times, in other places, and under different circumstances; nor was the plaintiff bound to offer proof of usage by other railroads, although evidence of such usage might have been competent, as bearing on the issue; but the question was, whether the defendants had been guilty of negligence at the time when the accident happened; and this was to be determined on the whole evidence in the cause, bearing on this part of the case—the bur-

den of proof being on the plaintiff; that the use of such precautions and guards as were directed by the statutes would not exempt the defendants from the consequences of negligence in other particulars; and that, although the jury should be satisfied that the defendants had complied with all the requirements of the statutes, such as ringing the bell on the engine, erecting sign-boards at the crossing, &c., this would not exempt them from liability, if the jury were satisfied they had omitted other precautions, which, in the exercise of due and ordinary care, they were bound to take, at the time, place and under the circumstances of the accident, the omission of which proper precautions was the efficient cause of the damage and injury to the plaintiff." Upon this point the judge read to the jury the opinion of this court in *Bradley v. Boston & Maine Railroad*, 2 Cush. 539, and directed the jury to take the rule there laid down for their guidance, so far as it was applicable to the present case.

The jury returned a verdict for the plaintiff in the sum of \$15,000; and the defendants alleged exceptions, which were argued at November term 1855.

C. G. Loring & G. Bemis, for the defendants. 1. The negligence of the plaintiff's husband was at least as good a defence as her own negligence. He having been present at the accident, had these defendants suffered injury by the collision, she, being a feme covert, could not have been held liable to them, either civilly or criminally. 2 Kent Com. (6th ed.) 133. *Rex v. Price*, 8 Car. & P. 19. *Regina v. Thompson*, 1 Denison, 549. *Park v. Hopkins*, 2 Bailey, 411. *Commonwealth v. Neal*, 10 Mass. 152. 16 Mass. (Rand's ed.) 389, note. The same result follows from her relation to him as his agent or servant. *Chandler v. Broughton*, 1 Cr. & M. 29. *M'Laughlin v. Pryor*, 1 Car. & M. 354. *Brucker v. Fromont*, 6 T. R. 659. *Parsons v. Winchell*, 5 Cush. 592. *Bishop v. Ely*, 9 Johns. 294. *Noble v. Paddock*, 19 Wend. 456. Oliphant on Horses, 167. His own declarations were competent evidence of his negligence, and were admissible against her, because of the identity of interest existing between them, both at the time of the accident, and when the declarations were made. Her cause of action accrued

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at the time of the accident, not of his death; and the same rules of evidence should be applied as if the action had been brought at the moment of the injury. When the declarations were made, he could have released all claim for her damages. *Southworth v. Packard*, 7 Mass. 95. *Ballard v. Russell*, 33 Maine, 196. *Beach v. Beach*, 2 Hill, (N. Y.) 260. *Turtle v. Muncy*, 2 J. J. Marsh. 82. Bingham on Infancy, (2d Amer. ed.) 210. If the suit had been brought in his lifetime, his declarations would plainly have been admissible in defence; and the cause of action survives to the wife, subject to what he has said or done. *Evans v. Smith*, 5 T. B. Monr. 363. *Taylor v. Bate*, 4 Dana, 202. 1 Cowen & Hill's Notes to Phil. Ev. (3d ed.) 73. *Dodge v. Manning*, 11 Paige, 334. She claims through him, not only as a necessary party, while living, to her suit; but as the principal party in privity of title. 1 Chit. Pl. (6th Am. ed.) 74. *Ballard v. Russell*, and *Beach v. Beach*, above cited. *Jones v. McKee*, 3 Barr, 496. 1 Greenl. Ev. §§ 170, 185, 254, and cases cited. 2 Greenl. Ev. § 341. See, for analogous instances of the admissions of declarations of persons in privity in matters of personalty, *Ivat v. Finch*, 1 Taunt. 141; 1 Stark. Ev. (4th Amer. ed.) 52, 53; 1 Cowen & Hill's Notes to Phil. Ev. 264; in matters relating to the realty, *Dartmouth v. Roberts*, 16 East, 334; *Doe v. Jones*, 1 Campb. 367; *Hodges v. Hodges*, 2 Cush. 455; in cases of partners and joint obligors, *Whiting v. Whitcomb*, 2 Doug. 652; *Wood v. Braddick*, 1 Taunt. 104; *Cady v. Shepherd*, 11 Pick. 400; Angell on Lim. (3d ed.) § 248; 2 Stark. Ev. (4th Amer. ed.) 42, 43, 45; of master and servant, principal and agent, consignor and consignee, *Price v. Powell*, 3 Comst. 322; 2 Stark. Ev. 43, 52, 53; *The Manchester*, 1 W. Rob. 62.

Under the peculiar circumstances of this case, the declarations of the husband were part of the *res gestæ*. *Aveson v. Kinnaird*, 6 East, 188. *Commonwealth v. M'Pike*, 3 Cush. 181. *Johnson v. Sherwin*, 3 Gray, 374. 1 Greenl. Ev. (7th ed.) § 108, note 2. 1 Cowen & Hill's Notes to Phil. Ev. 207, 210.

The fact of his death furnishes an additional reason for their admission.

2. The previous cautions or statements to the husband were admissible in evidence, as showing his knowledge of the disposition and habits of the horse, and thus affecting the degree of care required. Whatever was carelessness in the management of the vehicle at the time of the accident may be shown in defence. *Thorogood v. Bryan*, 8 C. B. 115. *McLaughlin v. Pryor*, 1 Car. & M. 354. *Beamon v. Ellice*, 4 Car. & P. 586. *Chandler v. Broughton*, 1 Cr. & M. 29. *Noble v. Paddock*, 19 Wend. 456.

3. The record of the adjudication of the county commissioners should have been admitted in evidence. (1.) As conclusive evidence of the lawfulness of the crossing upon a level. *Sts.* 1846, c. 271, §§ 1, 2; 1842, c. 22. *Rev. Sts. c. 39, § 80. Rice v. Commissioners of Highways*, 13 Pick. 225. *Commonwealth v. Westborough*, 3 Mass. 406. *Kingman v. County Commissioners*, 6 Cush. 306. *Callender v. Marsh*, 1 Pick. 418. (2.) As an official adjudication of the appropriate tribunal, that a gate tender or flagman was not necessary to the safety of travellers on the highway; or at least as competent evidence of proper care on the part of the defendants. *Bliss v. Deerfield*, 13 Pick. 110. Where the omission of statute precautions would raise a presumption of negligence, it is always for a party to show that he has fulfilled the conditions of the law, though additional precautions on his part might still be necessary. *Worster v. Canal Bridge*, 16 Pick. 541. *Parker v. Adams*, 12 Met. 415. *Bacon v. Boston*, 3 Cush. 174. *Bradley v. Boston & Maine Railroad*, 2 Cush. 539.

4. The court erred in refusing the instructions prayed for as to the precautions required by law of the defendants at the crossing.

R. Choate & H. F. Durant, for the plaintiff. 1. The declarations of the husband, in regard to the cause and circumstances of the accident, not made in the presence of this plaintiff, were hearsay, and rightly rejected. They were not admissible as declarations made against interest. *Framingham Manuf. Co. v. Barnard*, 2 Pick. 532. *Lawrence v. Kimball*, 1 Met. 524. *Watts v. Howard*, 7 Met. 478. *Chuggage v. Swan*, 4 Binn. 150. *Pottshall v. Turford*, 3 B. & Ad. 898. *Papendick v. Bridgewater*, 5 El. & Bl. 166. 1 Phil. Ev. (6th Amer. ed.) 296.

They were not declarations of one identified in interest with

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the plaintiff. 1 Greenl. Ev. § 176, 177, and cases cited. *Barrough v. White*, 4 B. & C. 325. *Bristol v. Dann*, 12 Wend. 142. The husband and wife never had a joint interest in the subject matter of this suit. This cause of action is for personal injuries to the wife. He could not alone have maintained any action upon it. 1 Chit. Pl. 85. The right of action was in her alone, notwithstanding coverture; and although he should have been joined as a plaintiff, yet his nonjoinder could have been taken advantage of in abatement only, and not in bar. *Dalton v. Midland Counties Railway*, 13 C. B. 474. The husband's only right in this claim was the same which he has over all the wife's choses in action—the right to reduce to possession; *Gallego v. Chevallie*, 2 Brock. 285; *Kintzinger's Estate*, 2 Ashm. 463; *Rumsey v. George*, 1 M. & S. 180; *Purdew v. Jackson*, 1 Russ. 1; and perhaps, as one mode of such reduction, to release it, though this is doubted. *Harrison v. Almond*, 4 Dowl. 321. Never having made it his property by reducing it to possession, nor even attempted to claim it, it remained his wife's sole property during coverture and after his death; and his admissions cannot now affect it.

Even if the action had been brought by them jointly, the husband's declarations would not have been admissible against the wife. *Alban v. Pritchett*, 6 T. R. 680. *White v. Holman*, 3 Fairf. 160. 1 Greenl. Ev. § 341.

The death of the husband does not make his declarations competent evidence. *Smith v. Scudder*, 11 S. & R. 326. *Wheeler v. Moore*, 13 N. H. 481. *O'Connor v. Marjoribanks*, 4 Man. & Gr. 440. *Doker v. Hasler*, Ry. & Mood. 198. 1 Greenl. Ev. § 131.

They were not competent as dying declarations. 1 Greenl. Ev. §§ 156, 158. *Rex v. Lloyd*, 4 Car. & P. 233. *The King v. Mead*, 2 B. & C. 605. *Wilson v. Boerem*, 15 Johns. 286. *Jackson v. Kniffen*, 2 Johns. 35.

They were mere narrations explanatory of the previous fact, and were not competent as part of the *res gestæ*. 1 Greenl. Ev. § 108, & note. *Salem v. Lynn*, 13 Met. 544. *Haynes v. Rutter*, 24 Pick. 242. *Merrill v. Sawyer*, 8 Pick. 397. *Scaggs v. State*,

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8 Sm. & Marsh. 722. *Cornelius v. State*, 7 Eng. (Ark.) 782. *In re Taylor*, 9 Paige, 611. *Noyes v. Ward*, 19 Conn. 250. *Davis v. Sanders*, 11 N. H. 263.

2. Upon similar grounds, the evidence of statements to the husband, concerning the character of the horse, not shown to have been known to the wife, are inadmissible against her.

3. The record of the county commissioners was properly excluded. The plaintiff had waived any claim on the ground of negligence with not complying with the lawful requisitions of the commissioners. "To exhibit a flag" was a duty which the county commissioners could not impose upon the defendants, nor release them from. *St.* 1846, c. 271, § 2. *Rev. Sts. c.* 39, § 80. Therefore so much of their order was void, and the remainder immaterial.

4. The instructions prayed for, so far as they are correct in point of law, were substantially covered in the instructions given.

SHAW, C. J. 1. The first point raised by the bill of exceptions arises upon the rejection of the declarations, concerning the cause and circumstances of the accident, made by the husband while in the railroad station. Upon consideration, the court are of opinion that, under the peculiar circumstances of the case, that decision was right.

The object manifestly was, to disparage the plaintiff's right to recover, by proving some facts or circumstances showing that he and the plaintiff were not without negligence on their part. But still, it was essentially of the character of hearsay statements without oath; and nothing sufficient to make it an exception, and take it out of the operation of the general rule against hearsay, was shown.

It is true that, if the husband had survived, and she had brought the action, he must have joined with her in the suit; not because the cause of action was joint, accruing to them jointly; nor because it was not a separate and independent cause of action, accruing to herself severally, for injuries to her own person; but because the rule of the common law, originating in the policy which regards man and wife as one person

in law, requires that, when a feme covert has occasion to come into a court of justice to obtain personal redress, the husband must join for conformity.

The cause of action was independent and personal to herself, not derived from, through or under the husband, at the time it accrued; and therefore, in the event which happened, that the husband died before the action was brought, she properly sued in her own right and name; and therefore the acts and declarations of the husband, at the time they were made, were the admissions of one with whom she was not privy in right, and by whose admissions she was not bound. The declarations were not made in the presence of the plaintiff, so that she could either correct them, or object to their correctness. They had none of the characteristics of a dying declaration; nor was it a case in which dying declarations of any deceased party would be competent evidence.

2. Another point of somewhat the same kind was made, by the offer of evidence on the part of the defendants, that, some time prior to the accident, statements were made concerning the character of the horse, to the plaintiff's husband; but as there was no evidence that the plaintiff was present, or that they came to her knowledge, they were rejected. This, we think, was right, upon the grounds already stated; and further, because the character of the horse, whether unruly, ill broken and unmanageable, or otherwise, was well known to the plaintiff and her husband, who had owned him for two years previous to the accident.

3. Perhaps the rejection of the evidence of the record of the county commissioners was more open to objection; because the *St.* of 1846, c. 271, forbids railroads to be made across highways at a level, or on the same grade, without the authority of the county commissioners. But as the record of the county commissioners, as offered, expressed a certain opinion of theirs respecting the necessity of keeping a flagman, which was not within their jurisdiction, and as the plaintiff's counsel admitted that the county commissioners, upon application of the defendants, had authorized and required the defendants to con-

struct their railroad, at the crossing in question, upon a level with the highway, upon certain conditions, which had been complied with, and did not think it necessary to require them to erect and maintain a gate across the railroad at such crossing, the particular paper, embracing the expression of an opinion not within their jurisdiction, was rightly rejected.

4. Much evidence was offered by the plaintiff, tending to show that the defendants were guilty of negligence, at the time and place of the accident, in various particulars; and much evidence was offered by the defendants to rebut and control this testimony, in all its particulars, and to show that great care was used at this crossing; and the jury had a view.

Several prayers for specific instructions were offered by the defendants, which the court refused to give; but did give instructions fully set forth in the bill of exceptions. It is objected, on the part of the defendants, that, taking the refusal of the prayers for instructions, and the instructions actually given, the jury may have believed, as the true rule of law, that although the railroad corporation had complied with all the regulations required by law, and had taken all such precautions previously, and used all such care and diligence, as men of common sense and ordinary skill and experience would consider requisite for the safety of passengers over the highway generally; yet, if there was anything peculiar in the time, place and circumstances, which would have rendered the presence of a flagman or guard specially useful on that occasion, such as the time of night, the detention of the train, if any, the snow on the ground, or the extreme cold; and if the presence of such guard, to give such seasonable notice to the travellers, would have prevented the accident; then the failure of the company to provide such a guard was such negligence as would render them liable.

If such was the impression made on the minds of the jury by the terms of the instructions, we think it would be incorrect. The rule, we think, is, that the company are bound to guard against all accidents likely to occur, which may be reasonably anticipated, from the season of the year, the time of night, and other circumstances. But if there be an unusual darkness, a

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thunder shower or snow storm, which, if it could have been anticipated, would have rendered extraordinary and unusual precautions useful and necessary, the want of them, upon any particular occasion of an extraordinary character, which could not be anticipated, would not be that negligence or want of ordinary care and prudence which would render the company responsible.

On examining these instructions, though in general cautious and well guarded, we are inclined to the opinion, that they may have impressed and influenced the minds of the jury in the manner suggested in the argument. The court stated correctly that the burden of proof was upon the plaintiff, who must prove want of ordinary and reasonable care, by omitting such warnings and precautions as persons of ordinary care, under like circumstances, would and ought to use; that the plaintiff did not claim damage by reason of the defendants not having a gate at this crossing—having expressly waived it; but that she did contend that the defendants were guilty of negligence, in omitting to have a flagman there, to give notice of the approach of the train. The court then stated that it was the duty of the plaintiff to satisfy the jury, that this was a proper precaution, in the exercise of ordinary care on their part, "*at the place, time, and under the circumstances proved at the time of the accident;*" and, in a latter part of the charge, "that the use of such precautions and guards as were directed by the statutes would not exempt the defendants from the consequences of negligence in other particulars; and that, although the jury should be satisfied that the defendants had complied with all the requirements of the statutes, such as ringing the bell on the engine, erecting sign boards at the crossing, &c., this would not exempt them from liability, if the jury were satisfied they had omitted other precautions, which, in the exercise of due and ordinary care, they were bound to take, *at the time, place and under the circumstances of the accident*, the omission of which proper precautions was the efficient cause of the damage and injury to the plaintiff."

We are apprehensive that, from the repeated reference to the time, place and circumstances of that accident, the jury may

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have taken the law to be, from the instructions given them, that, although the precautions taken at that crossing were such that, under ordinary circumstances, a flagman or watchman was not necessary to ensure the reasonable safety of passengers, yet, if the circumstances of the time and place, the weather, the state of the light, &c., were such, that if they were common and habitual a watchman would be useful and necessary, it was the duty of the railroad corporation to have a watchman there, and the want of one would be such negligence on their part as would render them responsible for the consequences of the disaster. Supposing the jury may have so understood the instruction, and acted under a mistaken view of the law in this respect, the court are of opinion that the verdict ought to be set aside, and a

New trial had.

A new trial was had in September 1857, before *Merrick, J.*, who signed the following bill of exceptions, of which the declaration and answer were made parts.

“The defendants, in order to show the vicious and unsafe character of the horse driven by the plaintiff at the time of the accident, offered to show, by the testimony of Henry L. Howe, that the husband of the plaintiff had before that time offered to sell the horse to said Howe, and had given as a reason for selling him, that the horse was so unmanageable and vicious that he could not keep him. The plaintiff had introduced evidence to show that her husband had used the horse and kept him as a family horse, and that he was never unmanageable with him. This evidence was excluded by the presiding judge.

“The plaintiff, and the only witness who was present with her at the time of the collision, and upon whose testimony to prove proper care and caution on the part of the plaintiff the case chiefly rested, testified that they drove in the middle of the travelled path up close to the crossing, when, as the engine approached, the horse gave one leap, and the engine struck them. The defendants offered evidence to show that the horse became terrified and left the travelled path, or that the plaintiff turned him from the travelled path, several rods before he

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reached the crossing; and that he went upon the land of the defendants at a place ten feet out of the highway, before the collision took place, and that the sleigh was there struck by the engine; and claimed, and asked the court to rule, that this would prove a case variant from that alleged in the declaration, and was besides of great importance, if found by the jury, as showing that the plaintiff's evidence, as to the mode in which the accident occurred, and the care used by her, was not reliable or true. The plan used at the trial may be referred to." [The information to be derived therefrom is sufficiently stated in the opinion.]

" But the judge instructed the jury, that, having regard to the question whether the parties respectively used due care, the precise place where the collision between the engine and sleigh actually occurred seemed to be of very little importance; that if the plaintiff wandered or unlawfully trespassed upon the defendants' premises, and there met with an accident, she could not recover; but that if the defendants were guilty of negligence in the management of their train, and thereby the plaintiff's horse was frightened, and ran or was driven upon the defendants' land, the defendants would be liable, under the pleadings in this action, although the collision had taken place out of the highway, and at the place indicated by the defendants' evidence.

" The presiding judge instructed the jury that, although the defendants had complied with all the statute requisitions in relation to the crossing, and running of their trains over it, they were further bound to use such proper precautions, and resort to such additional expedients in the conduct and management of their trains, such, for example, as moving them at a low and moderate degree of speed, as would enable travellers upon the highway to pass along thereon with safety, by using due care for their own protection; that the plaintiff was bound to use ordinary care in the conduct and management of her vehicle in the highway, and in the approach to and the passage of the crossing; and that the defendants were bound to use reasonable care in the conduct and management of their engines and trains, and that the manner and extent of this care would be such

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care in the conduct and management of the engines and trains as would be sufficient to enable a traveller upon the highway, who used ordinary care, there to pass over and by the crossing with safety.

"It appeared in evidence that the plaintiff's husband was killed by the accident, and the plaintiff lost the use of both arms, and her health was seriously affected and her general faculties of body and mind impaired, by reason of the injuries which she sustained; and that the plaintiff was the mother of a family of young children, and without property sufficient for their support. And the hardship, suffering and loss, which her injuries must occasion, and her helpless condition through the rest of her life, were urged upon the attention of the jury by her counsel.

"The counsel for the defendants requested the court to instruct the jury in relation to the principles and rules which should guide them in the assessment of damages; and, especially, in regard to the limitations in relation to pain, and the loss of bodily functions or mental powers, and in regard to injuries which were in their nature wholly intolerable, and not to be measured by any pecuniary standard; and also to instruct them that the plaintiff was not entitled to any other or greater damages on account of her peculiar domestic or social relations, or on account of her capacity to render her labor profitable to herself, under the allegations in her declaration. But the presiding judge did not so instruct the jury, and did not instruct them upon the subject of damages, except that the plaintiff would be entitled to full and adequate remuneration for all the loss she had sustained, and a compensation for all she had suffered; that they would not take into account, merely or chiefly, what sum would be equivalent to the charges and expenses of sickness and medical attendance, or what sum she would earn by her daily labor; but they should give her a sum equivalent to all the loss she had sustained, and a reasonable compensation for all the pain she had suffered; that there was no legal standard by which the jury could measure damages so as to adjust their award of money to injuries of such a nature as could not be estimated in money; and that they should be governed by a

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sound discretion in assessing the damages upon the evidence and proof laid before them, in relation to the injuries she had sustained; and that, exercising their own judgment upon this evidence, there was no limit to the amount of damages which they would be authorized to assess, except the amount of the claim made by the plaintiff.

"The jury returned a verdict for the plaintiff for eighteen thousand dollars. To the several rulings, instructions and refusals of the court above stated, the defendants excepted."

These exceptions were argued and decided at March term 1858.

E. R. Hoar, for the defendants. 1. The evidence as to the habits and disposition of the horse was admissible as a declaration accompanying and qualifying an act, and so making part of the act. 1 Greenl. Ev. § 108, and cases there cited.

2. The case proved by the defendants, as to the place and manner of the collision, showed a variance from the case alleged in the declaration. 1 Saund. Pl. & Ev. (2d ed.) 739. *Hartley v. Harriman*, 1 B. & Ald. 620. *Williams v. Morland*, 2 B. & C. 910. Rev. Sts. c. 39, § 85.

The ruling of the court did not cover the ground taken by the defendants, and upon which the evidence was most vital to the chief issue in the case, namely, the credit of the plaintiff and her friend as witnesses, and the evidence of care used by the parties respectively.

3. The instructions of the court with regard to the care required of the parties conveyed to the minds of the jury the idea that a different and higher degree of care was required of the defendants than of the plaintiffs, to avoid a collision; and made the defendants liable in case of accident without fault of either party, where each was careful. *Brand v. Schenectady & Troy Railroad*, 8 Barb. 368. *Beers v. Housatonic Railroad*, 19 Conn. 566.

4. On the subject of damages, the refusal to instruct the jury upon the points asked by the defendants, and the general language in which the instructions were given, permitted the jury to include elements of damages which the law does not recog-

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nize. *Carey v. Berkshire Railroad*, 1 Cush. 475. *Canning v. Williamstown*, 1 Cush. 451. *Baldwin v. Western Railroad*, 4 Gray, 333. *Rapson v. Cubitt*, 1 Car. & M. 41. In case of death from carelessness, the legislature have fixed the extreme limit of damages at five thousand dollars. *Sts.* 1840, c. 80; 1853, c. 414, § 1. The failure of the court to give the full instructions prayed for, and applicable to the case, is a ground of exception. *Kellogg v. Northampton*, 4 Gray, 65. And the amount of damages found tends to show that the jury have mistaken their duty. *Blake v. Midland Railway*, 18 Ad. & El. N. R. 93, and cases cited.

Choate & Durant, for the plaintiff. 1. The first exception is disposed of by the former opinion, *ante*, 56, 57.

2. The facts proved as to the mode and place of the collision do not show a variance from the declaration. *Housatonic Railroad v. Waterbury*, 23 Conn. 101. *Underhill v. New York & Harlem Railroad*, 21 Barb. 489.

The variance, if any, is immaterial, and may be cured by amendment, even after verdict. *Rev. Sts.* c. 100, § 22. *St.* 1852, c. 312, § 28. *Cleaves v. Lord*, 3 Gray, 66.

3. The rule of care, which the defendants were bound to exercise, was correctly stated. The term "reasonable care," as used in the charge to the jury, had no greater force than "ordinary care." Even if it had, no injustice was done to the defendants; for railroad corporations are bound to use reasonable care. *Bradley v. Boston & Maine Railroad*, 2 Cush. 540. *Linfield v. Old Colony Railroad*, 10 Cush. 562. *Macon & Western Railroad v. Davis*, 18 Georgia, 679. *Baltimore & Susquehanna Railroad v. Woodruff*, 4 Maryland, 242. *Trow v. Vermont Central Railroad*, 24 Verm. 487.

4. Upon the subject of damages, the instructions prayed for were indistinct and hypothetical. No allegation of special damage was necessary in the declaration. *Curtiss v. Rochester & Syracuse Railroad*, 20 Barb. 282. No special damages are alleged or claimed here; and the instructions given were correct, leaving the amount of damages, where the law leaves it, to the

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sound discretion of the jury. *Morse v. Auburn & Syracuse Railroad*, 10 Barb. 621.

SHAW, C. J. This cause has heretofore been presented to the court, under circumstances where the court felt themselves bound to set the verdict aside, and order a new trial. It is to be regretted that in a case of so much interest and importance, where the attendance of so many witnesses is necessary, and the trial in other respects is necessarily attended with great labor and expense, a second or third trial should be required. But as the use of railroads is still of comparatively modern origin; as this mode of transportation of persons and property, though of great public utility, is necessarily attended with great danger; and as railroad disasters, when they do occur, from negligence, accident or otherwise, are often, as in the present case, attended by the most deplorable consequences, involving disability for life; it seems necessary that each case should be decided upon the fullest deliberation, and decided upon such principles that it may stand as a precedent for succeeding cases, without danger of working injustice.

It will be considered that in the present case the plaintiff was not a passenger in the train of the defendant corporation, and therefore there was no contract for the safe carriage of the plaintiff, express, or implied by law, and no right existed, growing out of the well known relation of passenger and passenger carrier for hire. But though the duty of each of the parties toward the other, each using a common privilege or franchise, springs from a different source, it is not essentially distinct in its nature from that of passenger and passenger carrier. It is founded in the solid principle of equity, expressed by the maxim, *Sic utere tuo, ut alienum non lædas*. The rule therefore is, that in the use of a common privilege, where there is a possibility of interference, each is bound to bring to the use of such privilege such reasonable degree of foresight, skill, capacity, and actual care and diligence, as may be necessary to enable him to use the privilege with due regard to the safety of all others using like precautions, skill and care, and such as a person of ordinary sense, prudence and discretion would use in regard to his own

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affairs under like circumstances. If therefore an interference does take place, and damage is done to one or both of the parties, if one can show that he has in all respects used due and reasonable skill and care, in his previous preparations and actual conduct, and can show that the other party has not had the same skill and care, as required by the actual circumstances of the case, in consequence of which the interference occurred, he is entitled by law to a fair and just indemnity for the damage by him actually sustained. If it appears from the whole evidence, upon a careful investigation of the facts, that both parties used due precautions, skill and care, as required by the circumstances of time, place and manner of using the common privilege, notwithstanding which an interference unfortunately occurs, it is one of those cases of pure accident, to which all human beings are constantly exposed, for which no person is in fault, and in which all losses and damages occasioned thereby must lie where they first fall.

It appears from the uncontested facts, in the present case, that there was an open public highway in Needham, along which the plaintiff and her associates had a right, in common with all other travellers, to pass at all times and seasons, and over and along which they were in fact travelling at the time of the disaster; also that the defendant corporation had a franchise and right, granted by charter, to lay a railroad track and run trains of cars over and across the said highway; each taking all necessary and proper precautions to use the privilege with due regard to the safety of the other. To the extent of the surface covered by both these different roads, it is manifest that travellers on the highway and the proprietors of the railroad had a privilege in common; but it is equally manifest, from the different modes of use, that both could not use this intersecting surface at the same time. They are utterly incompatible. The duty, therefore, which the parties in such case owe each other, is to take all reasonable precautions, and use all proper skill and care, in crossing this intersecting part, and in approaching thereto, so as not to come to the intersecting point at the same time; in other words, not to come into collision.

The plaintiff therefore, in order to maintain her action, must show that she was using proper precaution, and all due care and diligence, at the place of crossing, and in approaching thereto; that the defendant corporation, their officers, agents or servants, did not use proper precaution and due care and diligence, in preparing their track, or in conducting and managing their train, and such as was reasonably necessary for the safety of passengers, at the place of intersection, and such as men of ordinary prudence, skill and experience would use in like cases, by means of which neglect or failure the collision ensued; and that it was not a case of pure accident, where neither party was in fault.

In coming to the report, it seems difficult to decide upon it, by adjudging that any precise decisions or rulings were consistent or not with the rules of law; the different grounds of objection, taken by the defendants, run so much into each other, that it seems necessary to consider one class of objections in reference to the others, and therefore to take a comprehensive view of the whole case.

Since the adoption of the new practice, under which precision, accuracy and fulness, in stating the plaintiff's case, are in a great measure dispensed with in the declaration, it is extremely difficult to say precisely what is within the issue, and considerable latitude of inquiry is admitted on the trial; and therefore, as the true issue or actual matter of controversy may shift a good deal during the trial, it imposes a heavy duty on the judge, so to shape his directions as to meet all those distinct views in which the case may be presented on the evidence.

1. We pass over the first objection of the defendants, that the testimony of Howe should have been admitted to prove that some time before the accident the husband offered the horse for sale, and gave as a reason that he was unmanageable and vicious. We formerly decided that the plaintiff's cause of action not being derived through the husband, she was not bound by his admissions; and we think there is nothing in the doctrine of *res gestæ* to make the supposed offer of sale of any more effect than an admission.

2. The next point raises the great question in the case. It

appears from the report that the defendants offered to show that the horse became terrified, and left the highway, turning to the left, several rods before he reached the crossing, and went off upon the land of the defendants, crossing the open ground between the road and the station, before the collision took place, and that the sleigh was struck by the engine, in attempting to cross the track, ten feet distant from the highway; and they asked the court to instruct the jury that this would prove a case variant from that alleged in the declaration; and was, besides, of great importance, if found by the jury, as showing that the plaintiff's evidence, as to the mode in which the accident occurred, and the care used by her, was not reliable or true. The plan used at the trial was referred to. It was stated in a previous paragraph of the report, that the plaintiff, (who was herself admitted as a witness under the new statute,) and the only witness who was present with her at the time of the collision, and upon whose testimony to prove proper care and caution on the part of the plaintiff the case chiefly rested, had testified that they drove in the middle of the travelled road up close to the crossing, when, as the engine approached, the horse gave one leap, and the engine struck them.

But the judge instructed the jury, "that, having regard to the question whether the parties respectively used due care, the precise place where the collision between the engine and sleigh actually occurred seemed to be of very little importance; that if the plaintiff wandered or unlawfully trespassed upon the defendants' premises, and there met with an accident, she could not recover; but that if the defendants were guilty of negligence in the management of their train, and thereby the plaintiff's horse was frightened, and ran or was driven upon the defendants' land, the defendants would be liable, *under the pleadings in this action*, although the collision had taken place out of the highway, and at the place indicated by the defendants' evidence."

Referring to the plan used at the trial, it appears that the place "indicated by the defendants' evidence," as the place where the horse was frightened, and either turned off from the highway, or was turned off by the driver as a matter of precau-

tion to avoid other danger, was five or six rods distant from the place of intersection of the highway and railroad; that the left hand side of the road, as the plaintiff was travelling, was marked by several trees, on the line separating the highway from the open grounds of the defendants; and, as it is conceded that the defendants had complied with the directions of the county commissioners, which required them not to build their station within one hundred feet of this highway, we are to presume that the space between the road and station was not less than that.

With this view of the evidence, connected with that of the plan, and the distance of the station buildings from the highway, the evidence offered by the defendants tended to show, that the fright of the horse, which, if these facts were found true, was the commencement of the chain of causes which led to the disaster, took place at a distance of five or six rods from the place of intersection of the two roads, and, considering the relative speed of the sleigh and the railroad train, when the latter was probably three or four times that distance from the place of intersection. It would also tend to prove that the actual and final disaster, instead of being occasioned by the actual striking of the sleigh by the locomotive engine on the highway at the place of intersection, was actually occasioned by the horse and sleigh passing out of the highway some rods before arriving at the crossing, passing into and over the open grounds of the defendants lying between the highway and the station, attempting to cross the track at a place some feet off from the highway, and there being struck by the engine.

Now there are three aspects, under which the facts which this evidence conduced to prove, if found proved by the jury, would affect the merits of the controversy, and which therefore required the attention and direction of the judge:

First. These facts, if proved, would contradict the testimony of the plaintiff herself, and of the only other witness who was with her, as to the main facts of the transaction, and so impair and diminish the weight of the plaintiff's evidence.

Second. These facts, if proved, would show a variance between the case stated in the declaration and relied upon in the

opening, and the facts as they actually existed ; and if, consistently with these facts, the plaintiff might still show due care on her part, and negligence on the part of the defendants, and thus entitle herself to a verdict, it could not be done under the pleadings in this action ; and this was a variance in substance, and not in form.

Third. If, under the great latitude generally allowed in declarations by the present practice, the latter facts could be given in evidence by the plaintiff, or, if given in evidence by the defendants, could be relied on to support the plaintiff's case then a very different issue of fact would be raised, requiring different evidence, and different corresponding directions from the court, both as to the nature and effect of evidence, and as to the instructions to the jury in matter of law.

Respecting the first point—that the effect of this evidence would have been to contradict the testimony of the plaintiff and the other principal witness—the judge made no remark. Perhaps none was necessary. The credit of the witnesses was a fact for the jury, and any remark upon it would rather be a comment on the evidence, than a direction in matter of law. The remark made by the judge was, that, having regard to the question whether the parties respectively used due care, the precise place where the collision actually occurred seemed to be of very little importance. This would be true, if the two places were near each other, and the circumstances of the cause of the disaster, and the conduct of the parties, were in all other circumstances alike. But if the difference of place, with the accompanying circumstances, would lead to a very different inquiry of facts, respecting the cause of the disaster, and the conduct of the parties, this would render the question of place of great importance. As we think the two cases or hypotheses would lead to different inquiries as to the facts on which the right of the plaintiff to recover depended, there is reason to fear that this remark had a tendency to withdraw the attention of the jury from the evidence having an important bearing upon other views of the case.

But the second point more directly affects the real controversy—the variance which this evidence would show between

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the case which the plaintiff would claim to establish by it, and that made in her declaration, and stated in her opening.

In general, the objection of variance between the declaration and the proof is regarded as a mere technical objection, and not favored; and where the transaction, out of which the controversy arises, is the same, and the substantial cause of damage is the same, the variance is overlooked. So far indeed is this carried, that in many cases, where a right or claim is defectively stated, the defect is considered as cured by a verdict, on the ground that the facts constituting the merits of the plaintiff's case must have been proved. And often, in such cases, when it is quite certain that an amendment, correcting the supposed defect in the declaration, would not change the course of inquiry, or affect the evidence, or the rules of law applicable to it, an amendment is allowed, without setting aside the verdict, that the judgment may stand regular on the record.

But where the case stated in the declaration and in the first instance opened and relied on by the plaintiff's counsel, and the case subsequently relied on in proof, whether that proof comes from the plaintiff or the defendant, admit and require different kinds and degrees of proof, and the application of different rules of law, there the variance, so far from being formal and technical, is radical and essential; indeed the two may be in many respects repugnant and inconsistent, so that the affirmance of the one would negative the other. In that case, it is the duty of the presiding judge to sustain the objection of variance, as going to the merits of the case, and to decide that the evidence is inadmissible, if offered by the plaintiff, and, if offered by the defendant, inadequate in law to sustain the plaintiff's case.

It appears to us, that upon a view of the whole case, as it appears upon the report, this was a case of the character stated, admitting and requiring very different proofs, in some respect repugnant to each other. To test this, it is necessary to see how the cases would present themselves on the trial.

In the case as stated in the declaration and once opened on the trial, indeed as the whole case presented itself on a former trial and report, the plaintiff relied on the facts, that she was

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driving on the highway, with a suitable horse and sleigh, managing with due care, and proceeded quite up to the railroad crossing, in the middle of the highway, and that the horse had entered upon the track, so as to be struck by the engine. The case to be proved, it must be all along remembered, is, that the plaintiff was without negligence in using a common privilege, which both could not use together; that the defendants were chargeable with negligence, either in their fixed arrangements, or in the management of their train, and that the accident was caused thereby.

The course of inquiry would be, in making out this case, first as to the care of the plaintiff: Was she travelling with a manageable horse, reasonably fit to travel on the highway? In approaching the track, and before entering upon it, was she well acquainted with the road? Did she know that a railroad track was there, or near there? If she did, did she, before permitting the horse to enter upon the track, stop or pause and listen, and look up and down the track, to ascertain by both senses whether a train was within sight or hearing? Was such pausing or stopping such an act as would ordinarily be done by a person of ordinary care and prudence? If a train was within sight or hearing, was it at such a distance, that a person of ordinary care and prudence would think it perfectly safe to cross before the train, or wait till it had crossed? Other points of inquiry would probably arise, in regard to due care on the part of the plaintiff.

On the part of the defendants, the inquiry would be, whether they had complied with the requisites of the statutes designed to secure the safety of travellers; whether they had taken such other precautions in regard to their fixed arrangements, as the safety of passengers would reasonably require at the crossings of highways; whether, in the management of their train, they were running with such reasonable speed as would be proper and suitable on approaching a highway; whether they had made the usual and proper signals; or whether they were chargeable with negligence in these and the like particulars.

Let us now see what would be the state of the controversy and the course of inquiry, if the facts had been proved, which the

evidence given by the plaintiff tended to prove. The case would then stand thus: that the horse was frightened on the highway, at five or six rods before reaching the railroad, that he ran off or was turned off from the highway, on to the open grounds of the defendants between the station and the highway, and in this unmanageable condition ran to and upon the track of the railroad at some feet distant from the highway, and was there struck by the engine after it had crossed the highway. Supposing this to be a case, upon which, if properly stated in a declaration, the plaintiff would have a right to recover, as before, on proving that the plaintiff was free from fault, and the defendants chargeable with negligence, by means whereof the disaster occurred; the facts to be shown would be very different, and the course of inquiry very different. The inquiry respecting the conduct of the plaintiff would be, whether a horse taking fright at the distant sound of a train, so low as not to be heard by the passengers, was reasonably safe and manageable, and fit to be used on the highway; and whether, after he had left the highway and gone upon the defendants' grounds, the plaintiff could by ordinary care have checked him, and prevented him from running on to the track. The inquiry on the other side would be, whether the agents and servants of the company did anything, or neglected or forbore to do anything, which could reasonably be required of them as men of ordinary care and prudence, the doing or forbearing of which had a tendency to frighten the horse; whether the rate of speed, rapid or otherwise, had any tendency to frighten the horse in the first instance, or bring the engine in contact with him, beyond the crossing of the highway; whether a flagman, watchman or guard on the highway near the track would have had any tendency to save the plaintiff from the accident which actually occurred, if she did not approach the track on the highway, or attempt there to cross, and if the accident occurred at a place out of the highway. We have said that, to some extent, these hypothetical cases are repugnant to each other, and proof of the one would contradict the other. If the horse was all the time, up to the time of the collision, under control and not frightened, and was

under control when crossing the track in the highway, it is repugnant to the supposition that he was frightened at five or six rods before reaching the track, turned off, and crossing land other than the highway, and not under control, attempted to cross the track at a place beyond the highway.

Besides, this last hypothesis is open, as the former hardly was, to the conclusion that neither party was in fault. If, upon the consideration of the whole evidence, the jury should find that the plaintiff and her associates were chargeable with no negligence on their part, and that the defendants were also free from the charge of negligence, then it is a case of pure accident, and the principle of law is very clear, that neither party is responsible for the damage sustained by the other.

This brings us to consider whether there is such a variance, in substance, between the case set forth in the plaintiff's declaration, and the case for the plaintiff, made by the evidence offered by the defendants, if it proved that the accident arose from the fright of the horse at five or six rods from the railroad crossing. And, in looking at the declaration, we find that, after stating that the defendants were proprietors of the railroad, with a branch running to Newton Lower Falls, at Needham, it avers that on the 27th of January 1852 she, with her husband, in a sleigh, was travelling with due care and foresight over the highway in Needham, across which the branch railroad was constructed, and, as they *were crossing the track*, a train of cars, drawn by a steam engine at great speed, belonging to and run by the defendants, *ran into and over* the vehicle, and threw them *upon the track* of the railroad, and ran over them, and broke their limbs, causing the death of her husband within a few hours, and breaking the arms of the plaintiff, and bruising her body and limbs. And subsequently, in describing the negligence of the defendant corporation, the plaintiff says, that the corporation were guilty of great negligence and carelessness, in consequence of which she and her husband were run over and injured *as aforesaid*; that the corporation gave no proper and legal notice of the approach and passing of said train across said highway, at the time of said injuries, nor any proper caution of the exist-

ence of said railroad crossing, and took no precaution to warn them and other travellers, or protect them from injury, as was their duty to do. The plaintiff further says, that said train was run across said highway at an unusual and dangerous speed, and to a point much further than usual or necessary. There is then a summing up of these specifications of the carelessness and negligence of the corporation, resulting mainly in the great and dangerous speed at which the train was run *across said highway* at a dangerous point, and in not guarding properly against collision with those who were *crossing said railroad, over said highway*, whereby the plaintiff was injured.

It is impossible, we think, to avoid the conclusion that this declaration describes one species of accident only, at one place—that of an actual and violent striking of the sleigh, whilst the horse and sleigh, manageable and under the control of the driver, were carefully crossing the track on the highway; and that it describes the negligence of the defendants to consist in not taking proper precautions to prevent the travellers from coming up to the place of intersection and entering on the track, and in running the engine and train with unusual and dangerous speed.

The court are all of opinion that this declaration could not be supported by proof that the horse was frightened at five or six rods distant from the crossing, ran or was driven upon the grounds of the defendants, and, unmanageable by the driver or otherwise, ran upon the railroad track, at a place out of the highway. The cause of the ultimate disaster would be different; the duties of the respective parties would be different; and although it might still be true that the disaster occurred without fault of the plaintiff, and by the negligence of the defendants, if proved, still it could not be recovered for, under these pleadings. We are therefore of opinion that the direction of the judge, that the plaintiff could recover for such damage under these pleadings, if the defendants were guilty of negligence, was not correct in matter of law. It follows therefore, as a necessary consequence, that, as the pleadings now stand, the jury should have been instructed that if they found, on the evidence,

that the accident occurred by the fright of the horse at a distance from the crossing, it would be a finding against the material averments in the declaration, and entitle the defendants to a verdict.

But it is insisted, on the part of the plaintiff, that as the injury, for which the plaintiff claims damages, grew out of the same transaction, substantially at the same time and place, and from the same cause, and the real merits were in fact tried, the variance is matter of form only; that the declaration might have been amended at the trial, either by altering the existing count, so as to make it broad enough to cover either mode in which the accident may have occurred, or by adding another count, setting out the second mode. And she asks leave so to amend now, in order that the judgment may stand right; but insists that this should be done without setting aside the verdict.

All the members of the court agree in opinion that, to warrant a judgment on the verdict, such an amendment would be necessary; but there is some difference of opinion upon the point whether the verdict should be set aside. Some of them are of opinion, that the case was substantially tried on its merits; and this derives support from that part of the report, which states that the judge charged that, if the defendants were guilty of negligence in the management of their train, and thereby the plaintiff's horse was frightened, and ran or was driven upon the defendants' land, the defendants would be liable under the pleadings in this action, although the collision had taken place out of the highway, and at the place indicated by the defendants' evidence.

But a majority of the court are of opinion that the merits of the cause were not tried, if the plaintiff relied on what we have called the second hypothesis, the fright of the horse at some rods distant from the crossing. It appears to them, that the judge's attention was called mainly to the variance between the place of the crossing and the place a little below the crossing, supposing all other circumstances to be nearly or quite the same; and the effect of the charge was, that some difference of the place of the accident would be immaterial.

The judge did indeed direct the jury, that "if the defendants were guilty of negligence in the management," &c., and *thereby* the horse was frightened. But no evidence appears to have been given in regard to the cause of that fright; it is not even stated that it was caused by reason of the train; but if it was, it was not shown what was the distance between the cars and the horse, or what act the managers of the train carelessly, negligently or unlawfully did, or forebore to do, which caused the fright of the horse; and no instruction was given to the jury as to what conduct on the part of those managers, in this respect, would constitute negligence. For these reasons, and those hereinbefore given, a majority of the court are of opinion that, if the amendment is made, so as to enable the plaintiff to place her claim upon this last ground, it will present new and material issues for the court and jury, which have not been tried, and therefore that the verdict must be set aside.

3. One other objection is taken on the part of the defendants, which at first sight does not seem to be of much importance, but which, taken in connection with other parts of the case, deserves attention. It is thus stated: The presiding judge instructed the jury, that the defendants, though they had complied with all statute regulations, were bound further to use such proper precautions and expedients as would enable travellers upon the highway to pass along thereon in safety, by using due care for their own protection; that the plaintiff was bound to use *ordinary* care, &c.; and that the defendants were bound to use *reasonable* care in the conduct and management of their trains, and that the manner and extent of this care would be such care in the management of their engines and trains, as would be sufficient to enable a traveller upon the highway, who used *ordinary* care, to pass over and by the crossing with safety.

We do not attribute much force to the argument that, by the use of the term "ordinary care" in regard to the traveller, and "reasonable care" in regard to the corporation, the judge intended to prescribe a higher kind or degree of care to be observed by the one than the other. We are inclined to think

that there was a variation in words only, and not in meaning. The true rule undoubtedly is, that the degree and measure of care and capacity are precisely the same; each is bound to take such care as men of ordinary sense, prudence and capacity would take under like circumstances, in the conduct and management of their respective vehicles.

But the instruction embraced in the close of the above paragraph of the report was obnoxious to a more serious objection. According to this direction, taken literally, the law would seem to be, that if the traveller should prove that he was travelling on the highway with due care, and, crossing the track, was struck by the engine, the very fact would show that the defendants had not used sufficient care, in the conduct and management of their engines and trains, to enable the traveller to pass with safety; and, without other proof of negligence, they must be responsible for the damages. This would certainly require a different rule and measure of care in the respective parties—which is not consistent with the rules of law; and would carry the implication that in all cases of actual collision at a crossing one or the other party must be in fault—which is far from being true.

In a case like that which was tried here, where the accident has occurred by the actual collision of the train and sleigh at the intersection of the roads, it may be very probable that one or the other party may be found in fault. But, as has been suggested in another part of this discussion, if the first cause of the accident, the *causa causantis*, was the fright of the horse, at some distance from the place of intersection, at which time the train was, without doubt, at a still greater distance from the same, a case may be well imagined, where it would appear that neither party was in fault in reference to the other, in which case neither would be responsible to the other in damages; as, in the correlative case, the rule is, that when both parties are in fault, and the carelessness of each has concurred in producing the disaster, the law cannot measure the degree of carelessness, and ascertain which is chargeable with the largest share of the blame; in neither case, can either of the parties have an action against the other.

Perhaps, as this part of the charge may have been controlled by other parts which would qualify it, we might not have thought this ground sufficient to set aside the verdict. But as the cause may be tried again, we have thought it best thus to notice it, that, if it should appear that neither party was chargeable with carelessness, as laid down and defined, the jury should be charged, as matter of law, that the defendants would, on such facts found, be entitled to a verdict. There must be not only actual negligence on the part of the party to be charged, but such negligence as actually caused the injury complained of, to enable a plaintiff to recover.

4. The only other subject which will require notice, is that relating to damages. Every one must have felt the extreme difficulty of laying down a rule of damages in a case where the damage is so great as to be incapable of being computed in money. Without any other remarks on the subject, the court are of opinion that one instruction, specially asked for by the defendants, should have been given. It is set forth prominently in the plaintiff's declaration, that her husband was killed by the same carelessness imputed to the defendant corporation, by which she herself was so severely hurt; and perhaps it was impossible to prevent this fact from coming out in the evidence. It also appeared in evidence that the plaintiff was the mother of a family of young children, without property sufficient for their support; and the hardship, suffering and loss which her injuries must occasion, and her helpless condition through the rest of her life, were urged upon the attention of the jury. The counsel for the defendants requested the court to instruct the jury, that the plaintiff was not entitled to any other or greater damages on account of her peculiar domestic or social relations—by which term we understand the loss of her husband, and the fact of her being the mother of a family of young children, without property sufficient for their support. But the presiding judge did not so instruct the jury.

Now, as it has been judicially determined that a widow is not entitled to damages for the death of her husband, by such a cause, *Carey v. Berkshire Railroad*, 1 Cush. 475, nor a parent,

in consequence of having dependent children, as was held in *Corning v. Connecticut River Railroad*, in Hampden county, (not reported,) we think that, to this extent, the defendants were entitled to the instructions prayed for. *New trial ordered.*

The plaintiff then, by leave of court, amended her declaration by adding a second count, so framed as to avoid the variance at the second trial; and a third trial was had at November term 1858 before *Merrick, J.*, and resulted in a verdict for the plaintiff for \$22,250, which the defendants moved to set aside for excessive damages. The judge reported to the full court the evidence upon the subject of damages, by which it appeared that the plaintiff lost her left arm, and part of the right hand; that her right arm was broken so that it never united, and she could not since feed or dress herself; that her head was badly cut, one eye injured, several teeth broken, and her body much bruised; her health and memory (which were previously very good) much impaired, and she suffered constant pain.

The case was argued upon this motion to set aside the verdict at March term 1859, before Dewey, Metcalf, Bigelow and Merrick, JJ.

Hoar & B. F. Butler, for the defendants. It is conceded that the damages sustained by the plaintiff are not of a kind capable of computation; and that, in order to disturb the verdict, the court must be satisfied therefore that "the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case." *Worster v. Canal Bridge*, 16 Pick. 547. *Coffin v. Coffin*, 4 Mass. 45. Wherever, applying this rule, the damages appear thus excessive, it is the right and the duty of the court to set the verdict aside, and send the case again to a jury. *Wood v. Gunston*, Style, 466. *Whipple v. Cumberland Manuf. Co.* 2 Story R. 670. *Collins v. Albany & Schenectady Railroad*, 12 Barb. 494. *Clapp v. Hudson River Railroad*, 19 Barb. 463. The rule is, that the damages are to be determined by the sound discretion of the jury. This is to be a legal discretion, and whether their verdict

is within the limits of a legal discretion is a question for the court.

What are the elements of damage to be included? (1.) The plaintiff is to receive but one compensation for all injuries, past and prospective. (2.) Actual expenses, loss of time, loss of capacity to earn money. (3.) A reasonable *solatium*, or satisfaction, for loss of bodily and mental powers, and pain of body and mind, which are the immediate and necessary consequences of the injury.

What are not to be included as elements in determining the amount of damages? (1.) Not the costs and expenses of litigation. *Barnard v. Poor*, 21 Pick. 381. *Day v. Woodworth*, 13 How. 363. (2.) Not interest upon the damages actually sustained. Delay in obtaining a judgment, where no tender can be made, is not to be paid for by a defendant. *Sargent v. Hampden*, 38 Maine, 581. (3.) Not the peculiar social or domestic relations of the plaintiff. She is to have no more because she was a wife and a mother. *Ante*, 80. (4.) Nothing for any peculiarity in the plaintiff's position in society, or capacity for earning money. *Baldwin v. Western Railroad*, 4 Gray, 333. If such elements were to be included, the prices of tickets should be graduated accordingly. (5.) Nothing for conjectural, prospective injury. *Rapson v. Cubitt*, 1 Car. & M. 41. (6.) Nothing by way of exemplary or vindictive damages; for the injury is the result of accident, not of malice or wilful negligence. (7.) Nothing, certainly, on account of the ability of the defendants to pay. *Blake v. Midland Railway*, 18 Ad. & El. N. R. 111.

It follows that the plaintiff is to receive only what would be a suitable compensation to the average of mankind for similar losses and injuries, and that, in estimates for the future, allowance is to be made for the future chances of life.

If the plaintiff has received injuries which cannot be estimated in money, that is only another form of saying that she has received injuries for which the law affords her no redress.

This verdict is clearly excessive, immoderate, intemperate, and could not have been determined by a reasonable and dispassion-

ate application of correct legal principles. This appears by the following tests: (1.) The measure which the law gives for an injury which is fatal. *St.* 1853, c. 414, § 1. *Theobald v. Railway Passengers Assurance Co.* 26 Eng. Law & Eq. 438. *Collins v. Albany & Schenectady Railroad*, 12 Barb. 500. (2.) The judgment of the two previous juries who have tried the case. The verdicts have been successively for \$15,000, \$18,000 and \$22,250, all of them enormous, and increasing in such a rapid proportion. (3.) The measure of compensation by which employments involving the greatest risk to life and limb are recompensed. (4.) The ordinary result, on an average, of the whole lives of men and women in this community, exposed to any degree of hardship, suffering and exposure, so far as the acquisition of property is concerned. (5.) The relative amounts of fines, compared with terms of imprisonment, imposed as punishments for crimes. (6.) The amount of an annuity which the damages assessed would purchase for the plaintiff, supposing that the law does not contemplate the provision of an estate for her heirs. (7.) Sums ordinarily assessed against persons of ordinary ability to pay, who may be liable to such a claim. (8.) Which is perhaps the only reliable standard of comparison, as indicating the general sentiment of reasonable and considerate persons, acting under the responsibility of jurors, in this community—the general rate of verdicts, in cases of injuries of the same kind, and as great or greater in degree, in this commonwealth—forming what may be fairly considered the market price of such claims. There have been only three other such cases in which a verdict of more than \$10,000 has been rendered for personal injuries, to wit, for \$12,000 in *Ostinelli v. Boston & Worcester Railroad*, Suffolk, 1841, which was reserved by the presiding judge for the full court, and settled by the parties for \$5,000; for \$12,000 in *Southwick v. Boston*, Suffolk, 1854, which was a case of total destruction of physical power; and for \$16,000 in *Brown v. New York & New Haven Railroad*, Essex, 1855, which was rendered under the excitement produced by the great disaster at Norwalk, Conn., and after the admission, without objection, of evidence of the value of the plaintiff's

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practice as a physician; and neither of those cases therefore affords any precedent for rendering judgment upon the verdict in the case at bar. (9.) The amount of verdicts in such cases elsewhere, and the manner in which they have been regarded by courts of high character and authority *Diblin v. Murphy*, 3 Sandf. 19. *Collins v. Albany & Schenectady Railroad*, 12 Barb. 492, and cases there cited. *Hegeman v. Western Railroad*, 16 Barb. 353. *Holbrook v. Utica & Schenectady Railroad*, 16 Barb. 113. *Clapp v. Hudson River Railroad*, 19 Barb. 461. *Curtiss v. Rochester & Syracuse Railroad*, 20 Barb. 282.

Choate & Durant, for the plaintiff. The plaintiff, having been wholly deprived, by the negligence of the defendants, of all power to support or even feed or dress herself, was entitled to recover as damages, (1.) The amount of her expenses for physicians and for support and maintenance, during the seven years since the accident; (2.) A sum which will defray similar expenses during her natural life; (3.) The expenses of an attendant for the past seven years, and during the residue of her life; (4.) A full compensation in money, for every pain of body or mind, which she has been compelled to endure hitherto, and which she must suffer in the future. The verdict returned does not exceed these limits.

But, in order to have it set aside, the defendants must show, not only that the damages were excessive, but that they are so very excessive that the court are bound to infer, from that excess, that the jury were influenced by improper motives and by passion. *Wilford v. Berkeley*, 1 Bur. 609. *Duberley v. Gunning*, 4 T. R. 651. *Chambers v. Caulfield*, 6 East, 244. *Gilbert v. Burtenshaw*, Cowp. 230. *Fabrigas v. Mostyn*, 2 W. Bl. 929. *Sharpe v. Brice*, 2 W. Bl. 942. *Leith v. Pope*, 2 W. Bl. 1327. *Leeman v. Allen*, 2 Wils. 160. *Beardmore v. Carrington*, 2 Wils. 244. *Coleman v. Southwick*, 9 Johns. 45. *Sargent v. ———*, 5 Cow. 106. *Ryckman v. Parkins*, 9 Wend. 470. *Clark v. Binney*, 2 Pick. 113.

This is the third verdict which the plaintiff has obtained; and there is no instance known of a third verdict having been set

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aside on the ground of excessive damages. Where, upon a new trial granted for excessive damages, the jury gave the same damages again, a third trial "was moved for, and denied, because there ought to be an end of things;" and in another similar case, "the court said, it was not in their power to grant a third trial." *Clerk v. Udall*, 2 Salk. 649. *Chambers v. Robinson*, 2 Stra. 692.

The difference between the amounts of the verdicts may well be due to the impossibility of appreciating in advance the probable extent of the injuries. But after seven years of life as a cripple, in a darkened room, it is more evident.

Where, on the whole, substantial justice has been done, the court will not disturb the verdict, although the jury may have taken elements into consideration which should in strictness be excluded, such as lapse of time, costs and expenses. But it does not appear here that the jury have included any such elements.

Hoar, in reply. The cases cited, of refusals to set aside a second verdict on the ground of excessive damages, were cases in which the amounts of both verdicts, and the causes assigned for setting each aside, were the same. In 2 Salk. 649, "several cases were cited, which the chief justice [Lord Holt] allowed, that where upon the second trial the jury have doubled the damages, a third trial had been granted."

Here the two first verdicts were set aside for errors in the instructions of the judges, one of which, at the second trial, consisted in permitting the jury to include illegal elements of damages; the declaration has been amended since the second verdict, so as to state a new cause of action; and the damages assessed have been so increased by each successive verdict, as to show that the jury must have added interest and costs and expenses, which were not legal items, or intended to indicate to the defendants that any attempt to try their rights would be followed by an increase in the damages.

At this rate, a railroad corporation may be obliged to pay, in damages for one accident, the whole amount of their capital stock.

THE COURT, after consulting the chief justice, gave

Judgment on the verdict.

Sears & another v. Russell & others.

MARIAN SEARS & another vs. GEORGE R. RUSSELL & others.

By a devise and bequest, in trust to pay the net income to a daughter of the testator for life, and, upon her decease, to select out of the property a sufficient amount to pay a certain sum to her surviving husband, and to appraise and divide the residue and convey it in equal shares to her children or their issue in fee, the trustees take an estate in fee; and upon the death of the daughter, and after payment of the sum to her husband, are bound to appraise, divide and convey the residue to her issue.

Where property is devised and bequeathed in trust to pay the income to a daughter of the testator for life, and, upon her decease, to convey to her children then living, in equal shares, and to the issue of deceased children, to hold to them, their heirs and assigns forever; or, in default of any such child or issue, to convey to the heirs at law of the testator, and in case of the death of any child of the daughter, without issue, after its mother, and before its father, the share of such child not to go to its father, but to the testator's heirs at law; the gift of the share of a child of the daughter, in case of such death of that child, is to those who shall be then the heirs at law of the testator; but such gift is void for remoteness, and therefore the issue of the daughter are entitled, upon her death, to a conveyance in fee.

It seems, that in a will devising and bequeathing property in trust to convey it, upon the termination of a life estate, to certain persons or their issue in fee, and, in default of such persons or issue then living, to the testator's heirs at law, a provision that this shall not prevent any of those persons, who shall have arrived at a certain age before the termination of the life estate, from disposing of their shares by will, is inconsistent with and defeats the gift over to the testator's heirs at law.

BILL IN EQUITY by the infant children of Frederic R. Sears and Mary Ann Sears, his deceased wife, against George R. Russell and Francis G. Shaw, trustees under the will of Robert G. Shaw, her father, and the other heirs of the testator, to establish the plaintiffs' right to certain real and personal property of the testator. The parties stated this case :

The will of Robert G. Shaw contained a devise and bequest of real and personal property to said trustees, (jointly with Samuel P. Shaw, who had since resigned that office,) "for the use of my daughter Mary Ann Shaw," "the same to be held by the said trustees, their survivors and survivor, his heirs and assigns, in trust to lease and demise the real estate, and invest the personal estate, to collect the income thereof, to pay from out thereof the cost of repairs, insurance, taxes and other charges, and then in trust to pay over the surplus to the said Mary Ann during her life, for her sole and separate use; and

in trust further, upon the decease of the said Mary Ann, to grant and transfer the estates so devised in trust to the child or children of the said Mary Ann, then living, in equal shares; the issue of any deceased child to take its parent's share; and in default of any child or issue then living, to convey the same to the heirs at law of the testator."

The will contained similar devises and bequests for the benefit of each of the testator's other daughters and of one son and grandson, and added these provisions:

"In trust further, from time to time, upon the decease of my said son, daughters or grandson before named, as the same shall happen in the order of Providence, to surrender, grant, convey and transfer the said specific shares or portions of such trust property so devised as aforesaid for the use and benefit of such deceased son, daughter or grandson, or the property in which it may then be invested, or so much of it as shall then remain, to the child (or, if more than one child, to the children) then living, of such deceased son, daughter or grandson, in equal shares, and to the lawful issue of any such child or children, then deceased, by the right of representation, such issue to take the share to which his or her parent, if then living, would be entitled, to hold the same to them and their respective heirs and assigns forever; or, in default of any child or issue then living, to convey the same to my heirs at law.

"Provided, however, and it is my will and intention, that, if any of my sons in law survive their respective wives, or if my daughters in law survive their husbands, such sons in law or daughters in law so surviving shall be entitled to receive, to his or her own use, before the distribution last aforesaid, the sum of twenty thousand dollars each, to be deducted and paid out of the specific share or portion hereinbefore set aside, assigned and devised in trust for the benefit of such deceased husband or wife, son or daughter aforesaid, in such assets as my said trustees may select, belonging to such share or shares as aforesaid. And, having thus provided for my sons in law and daughters in law as shall or may outlive my children, their husbands and wives, I deem it fit and proper that, in case of the decease after-

wards, and without issue, of any of my said grandchildren, they the surviving sons in law or daughters in law should not become seised or possessed, by heirship or otherwise, of any right, property, interest or estate in the said distributive share or shares of said trust property belonging to such grandchildren, any law or usage to the contrary notwithstanding; and I accordingly will and direct that, in case of the decease of any one or more of my grandchildren during the lifetime of such surviving son in law or daughter in law, the distributive share or shares of said grandchildren or either of them so deceasing without issue shall not pass to or vest in such surviving sons in law or daughters in law, but on the contrary I do hereby give and devise the same to my heirs at law.

“ Provided however, that nothing herein contained shall prevent or deprive such of my grandchildren before named, who shall be living and have arrived at the age of thirty years at the time fixed for the said distribution, from making a last will and testament, to take effect from and after the decease of such grandchild or grandchildren, giving or devising his, her or their share of the trust property to such person or persons as he, she or they may choose.”

The testator further authorized the said trustees, when the time for the distribution of any of the trust estates should arrive, to divide, appraise, convey and transfer the same, and to sell and convey sufficient of the said trust property to pay any share in money.

Mary Ann Shaw was married, and one of the plaintiffs born, after the execution of the will and before the death of the testator, and the other plaintiff was born after the testator's death. Upon the death of the plaintiffs' mother, questions arose as to the title of her children to the property held in trust for her benefit, and this suit was brought to obtain the decision of the court.

The plaintiffs claimed that upon the decease of their mother, it was the intent of the testator, that said trust estate should determine, and that the trustees, after paying to the plaintiffs' father the sum of twenty thousand dollars, should transfer and

convey all said trust fund to the plaintiffs in fee simple; that the gift over to the testator's heirs at law, in case the plaintiffs or either of them should die before their father, was illegal and void on account of remoteness, and could have no effect to limit or restrain the previous gift in fee; and that the plaintiffs were entitled to receive and hold their portions absolutely.

The defendants admitted that by the terms of the will, said trust fund, upon the decease of the plaintiffs' mother, was to be paid and conveyed to her children in equal shares, after payment of the sum of twenty thousand dollars, and therefore the plaintiffs were apparently entitled to demand a transfer and conveyance thereof; but suggested that by a subsequent provision it was declared to be the testator's intent that if any child should die, without issue, after its mother, living its father, the share of that child should go to the heirs at law of the testator; and that the defendants were not bound to assume the responsibility of determining whether that limitation was void.

The case was argued in writing by *F. C. Loring*, for the plaintiffs, and *C. W. Loring*, for the defendants.

BRELOW, J. In the consideration of the important questions raised in this case, and in stating the conclusions to which we have arrived respecting them, we have been greatly aided by the very learned and elaborate argument submitted by the counsel for the plaintiffs.

The first question relates to the nature and extent of the estate taken by the trustees under the will of the testator. This must be determined mainly by a consideration of the objects and purposes of the trust, and not by a strict application of the legal rules of construction to the words by which the limitation to them is created. The rule is well settled, that trustees will be held to take that quantity of interest in estates devised to them, which the exigencies of the trust may demand; and where lands are devised to trustees to convey to the objects of the testator's bounty, the legal estate necessarily vests in the trustees till they have conveyed it, and it must be commensurate with the estate which they are bound to convey; if they are to grant a fee, it is necessary they should have a fee

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Doe v. Field, 2 B. & Ad. 564. *Cleveland v. Hallett*, 6 Cush 407.

In the present case, the words of the will are apt and sufficient to create a fee in the trustees. If their powers and duties had been limited to the natural life of the testator's daughter, so that after her decease nothing further would have been required of them, it might well have been held that they took an estate only for the life of the *cestui que trust*, notwithstanding that by the strict terms of the will a larger estate seemed to have been vested in them. But the trusts with which they were clothed did not so terminate. Other duties were appointed to them, which could not be executed until after the death of the testator's daughter, and which required an interest to be vested in them larger than an estate *pur autre vie*. They were not only to hold the property during the life of the *cestui que trust*, and pay over to her the net income; but after her death they were to select, out of the assets in their hands as trustees, an amount sufficient to pay to her surviving husband the sum of twenty thousand dollars; they were then to appraise and divide the residue of the property in their hands, and to grant and transfer the same in equal shares to her children, if living, or their issue, and, in default of any child or issue, to convey the same to the heirs at law of the testator. These superadded duties, to be performed by the trustees after the death of the testator's daughter, are clearly inconsistent with the idea that their estate was to terminate with her life. The power to take a portion of the fund at their discretion, to be paid over to the son in law, and the duty of appraising, dividing and conveying the residue, necessarily require an absolute estate in the trustees, the equitable interest being in those to whom the property was to be paid and transferred by them in the execution of the trusts. The nature of the estate which the trustees, upon the death of the testator's daughter, were required to convey to her children or their issue, is even more decisive of this question. The will in terms provides that the estate shall be conveyed to such children, and the issue of deceased children, "to hold the same to them and their respective heirs and assigns forever." This

makes it clear that the estate which the trustees were bound to convey to those who should be entitled to it under the will was ultimately to vest as an estate in fee; and therefore, that the trustees, upon the principles above stated, themselves took an estate in fee.

It is equally clear that this conveyance was to be made upon the decease of the testator's daughter. The duties which then remained to be performed by the trustees all have reference to this event. Such indeed are the express terms of the will. It is, upon her decease, to her child or children "then living," or, in default of child or issue "then living," to the heirs at law of the testator, that the trustees are to make the conveyance. Nothing precedent to this is to be done by them, except to select out of the assets in their hands twenty thousand dollars to be paid to the surviving husband of the *cestui que trust*. But this was also to be done upon the decease of the testator's daughter, and although necessarily prior in time, it was to be essentially part of the same transaction, had relation to the same event, and could not operate materially to postpone the time when the conveyance was to be made by the trustees.

The literal meaning of the language of the will in this particular is fortified by other decisive considerations. One of these is, that if the estate of the trustees is not to be terminated by a conveyance upon or immediately after the decease of the *cestui que trust*, it is not limited by any other provision of the will. No other time is fixed or referred to. Their estate is left wholly indefinite. Such could not have been the intent of the testator. Nor could the trustees, in the absence of any express limitation, claim to hold for an unlimited period. In such case, upon the determination of the life estate of the *cestui que trust*, and the payment of the sum of twenty thousand dollars to the testator's son in law, as no further act was to be done, except to make the conveyance, it would follow as a legal conclusion that this remaining duty was then to be performed. Their right to hold the legal estate could not be held to extend beyond the time necessary for the full discharge of the duties imposed by the trust.

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Another consideration leading to the same conclusion is found in the absence of all directions in the will concerning the management of the estate and the payment and disposal of the income by the trustees after the death of the testator's daughter. During her life, the provisions of the will in these particulars are clear and explicit. The omission of them in providing for the event of her death clearly indicates an intent of the testator to terminate the trust upon the happening of that contingency and the conveyance of the estate according to the provisions of the will.

It follows from these views, that the estate which vested in the trustees was not an estate for the life of the testator's daughter, but a fee; and that upon her death, after payment to her surviving husband of the sum of twenty thousand dollars, they are bound to appraise, divide and convey the residue to her children, who already have the equitable interest in the estate, in conformity with the directions contained in the will.

We are thus brought to a consideration of the nature and quality of the estate which the plaintiffs will take under the conveyance to be made to them by the trustees. There would have been no room for doubt or question on this point, if the will had contained no provision beyond the direction to the trustees to convey the estates to the testator's grandchildren, if living, or to their issue, or in default of such children or issue, to the heirs at law of the testator. The plaintiffs would then very clearly have been entitled to an estate in fee simple.

If the devise had been to the children of the daughter and their heirs forever, but, if they died without issue, then to the heirs at law of the testator, it would have created an estate tail by implication. The gift over would then have been on an indefinite failure of issue, and the law, implying an intent in the testator that the issue were to take the estate in succession, as children and heirs of the parent, would cut down the fee to an estate tail. *Nightingale v. Burrell*, 15 Pick. 104. *Hall v. Priest*, 6 Gray, 18.

But no such implication can be raised under the provisions of this will. The gift over is not on an indefinite failure of issue

of the daughter, but on such failure in the lifetime of the husband. The intent of the testator is expressly declared to be, not for the benefit of the issue of the children, but to exclude their father from inheriting the estate from them. Upon his death, their estates are to become absolute, and if they should die in his lifetime, leaving issue, the estate would descend to such issue in fee. The description of the contingency, therefore, upon which the gift over is to take effect, is such that it must be construed to be an executory devise. The gift to the children was of a fee; it cannot be cut down to an estate tail by implication; there can be no remainder after the gift of a fee; it is the limitation of a fee on a contingency after a previous estate in fee, and must take effect, if at all, as an executory devise. The heirs at law of the testator, to whom the estates are devised upon the happening of the contingency, if they do not take by descent, must claim as executory devisees.

But it is urged, that the limitation being to the heirs at law of the testator, the estate must vest in them by descent, and that they cannot take as purchasers under the will. This argument is founded on the well settled rule of law, that a devise to an heir, of the same estate in nature and quality as that to which he would be entitled by descent, is void. In such cases, the heir takes by descent and not as purchaser. *Ellis v. Page*, 7 Cush. 161, and cases there cited. If this rule applies to the present case, then it would follow that the gift over to the heirs at law would fail as an executory devise, so that their title would not depend upon the principles of law by which estates of that nature are governed.

But it is entirely clear that this devise over to the heirs of the testator does not come within the recognized tests by which an heir is held to be in by descent and not by purchase. It is essential to a title by descent, that the heir should take the same estate in quantity and quality, as if no will had been made and the estate had been left to descend to him; and this rule is not affected by carving out of the fee a prior particular or contingent estate, or subjecting it to an executory devise. All that is necessary to the operation of the rule is, that when the estate

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vests in the heirs, they should hold it by the same tenure and in like manner as if the devise had been omitted. If the nature or quality of the estate is changed when it comes to the heirs, or if they take it in different shares or proportions, the descent will be broken, and they must come in as purchasers under the will. *Ellis v. Page*, 7 Cush. 164. *Reading v. Royston*, 1 Salk. 242, 2 Ld. Raym.:829, and 1 Com. R. 123. 6 Cruise Dig. tit. 38, c. 8, §§ .9, 10.

Applying this rule to the present case, it is clear that the heirs at law of the testator must take as devisees, and not by descent. The limitation over to them is contingent until the prescribed event shall occur. The devise is to those who shall be his heirs when the contingency arises, and not to those who were his heirs at the time of his decease. They must take the estate under and by force of the will, in such proportions as it may vest in them when the event occurs, and not as heirs at law in the shares to which they would have been entitled if the devise over to them had been omitted. Such, we think, was clearly the intent of the testator. The rules of construction, that the word "heirs" in a will is usually construed to mean those who are such at the time of the testator's decease; and that estates created by devise are to be held to be vested rather than contingent; must give way to the controlling rule of interpretation that the intent of the testator is to govern, if it does not conflict with the rules of law. *Cholmondeley v. Clinton*, 2 Jac. & Walk. 70, 80, 89. *Doe v. Frost*, 3 B. & Ald. 546. *Richardson v. Wheatland*, 7 Met. 169. *Olney v. Hull*, 21 Pick. 314. And if it be found to conflict, it does not change the rule of construction. The will must fail of effect so far as it violates the rules of law, not because the intent of the testator does not control its construction, but because the law will not permit his intent to be accomplished. *Brattle Square Church v. Grant*, 3 Gray, 158. *Hall v. Priest*, 6 Gray, 22, 23.

The intent of the testator, in making the limitation to his heirs at law in this clause of the will, is not left in any doubt. It is expressly declared to be to prevent his son in law from inheriting any portion of the testator's estate as heir to his children.

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The devise to the heirs was to take effect only upon one contingency. If the child survived the father, or died in his lifetime, leaving issue, the heirs at law were to take nothing. The object of the testator was, not to benefit his heirs, but to break the legal course of descent in a certain contingency, so as to exclude his son in law from participating in his estate beyond the specific sum bequeathed to him.

To carry out this intent, it is necessary to construe the limitation to heirs as being to those who should hold that relation when the contemplated contingency should happen. If it should be held to mean a devise to the heirs of the testator at the time of his decease, this declared purpose would be defeated. The right or possibility of taking the estate in the prescribed contingency would then have vested in part in the testator's daughter at his decease, as one of his heirs; on her death, her share or proportion of this right or possibility would have descended to her children; and, in case of their death, without issue, in the lifetime of their father, it would go by descent to him — the very result which the testator sought most sedulously to prevent by this limitation to his heirs. It cannot be supposed that the testator intended to make a provision, the effect of which would be to admit his son in law to a share in that part of his estate from which he expressly declared it to be his purpose to exclude him. a/p/7

But this is not the whole extent to which this intent might be defeated, if the term "heirs at law" in this devise should be construed to be the heirs general of the testator at the time of his decease. It would then be a vested interest in them; if any of his children should die, leaving issue, this interest would descend to their children; in case of their death, it would go to their surviving parent, the son in law or daughter in law of the testator. To illustrate by an event which is understood to have already occurred: One of the testator's sons has deceased since the probate of the will, leaving an only daughter, who, as her father's representative, takes his right to this contingent interest, if it was vested at the time of the testator's death. If the daughter should die, this interest would go to her mother, &

daughter in law of the testator ; so that in the event of the death of the plaintiffs or either of them, that daughter in law would take, as heir of her own daughter, a portion of the estates devised to these plaintiffs. The result of such an interpretation of this gift over to the heirs would therefore be, in the supposed contingency, to give a portion of the testator's estate, not only to his son in law, the father of the plaintiffs, but also to a daughter in law, the wife of one of his sons, contrary to his distinctly declared intention ; and the same result would follow in the like contingency in regard to the estates devised in similar terms to the testator's other children.

This view of the intent of the testator in the gift over to his heirs at law is greatly strengthened by the use of the same words with a similar meaning in a preceding part of the same clause in the will ; by which he directs the trustees, in the event of the death of his daughter, without issue, to convey the estate, which had been held by them in trust for her use, to his heirs at law. Here he clearly intended that the conveyance should be made to those who should be his heirs at the time the contingency should occur, and not to those who were his heirs at the time of his death. If the latter construction were adopted, it would follow that his daughter, being one of his heirs at his decease, had an equitable estate for life, and also a vested right to a conveyance in fee of the same estate, upon her own decease—an interpretation manifestly absurd ; as it would present the anomaly of the creation of a trust estate for life for the separate use of the daughter, carefully guarded so as to be beyond her own control and that of her husband, accompanied with a vested right to a conveyance of the whole estate in fee, subject to her absolute disposal. The language of the will and the intent of the testator are coincident. The trustees were to convey to persons *in esse* when the contingency should arise. The conveyance was to be made to persons then answering the description of the testator's heirs at law, and not to those who were such at his decease, one of whom must necessarily have died before the contingency could arise. This interpretation of the term "heirs at law," as used by the testator in directing a conveyance

by the trustees, is too clear to admit of doubt. It is reasonable to infer that the same words were used with like meaning in the very next clause of the will, in disposing of the same estates in the event of the occurrence of another contingency.

Without enlarging further upon this part of the case, the considerations already suggested render it certain that the intent of the testator was to devise the estates to those who should be his heirs at law at the time the gift over should take effect. They cannot claim by descent, because the estate on the happening of the prescribed contingency would not vest in those who were the heirs of the testator at the time of his decease, and those who would be entitled could not take in the same proportions as they would have done, if the devise over had been omitted. They must take, if at all, under the will as purchasers by force of the executory devise.

The only remaining question is, whether the intent of the testator can be carried out consistently with the rules of law; that is, whether the gift over as an executory devise will certainly take effect within the limits which are essential to its validity. The principles applicable to estates of this nature have been fully considered and explained in a recent case. *Brattle Square Church v. Grant*, 3 Gray, 142. It was there held, that a limitation by way of executory devise, which may possibly not take effect within the term of a life or lives in being at the death of the testator, and twenty one years afterwards, (adding, in case of gestation, about nine months,) is void for remoteness. In the present case, the limitation over was not to take effect until after the death of the testator's daughter, and after the death of her children, including those born after the death of the testator, or any of them. It was not a limitation upon a life in being, with twenty one years superadded, but upon a life in being, and after its termination upon a life or lives not in being at the time of the testator's death, and which might continue for fifty years or more after the life of the first taker. Indeed the gift over could not take effect within the prescribed period as to the share of any child born after the testator's death, unless it died within twenty one years after its mother.

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Standing by itself, therefore, as a devise to the mother, and, after her death, to her children, born or unborn at the testator's death, and, on their decease, to those who should be then the heirs of the testator, it was clearly too remote, because it was a limitation which possibly might not take effect until after the termination of a life in being at the testator's death, to wit, the life of the testator's daughter, and more than twenty one years afterwards; that is, until the death of her after-born children, which might not occur within the allotted period.

But it may be suggested, that as the gift over was limited on the death of a child or children, in the lifetime of the father, without issue, and as the father was living at the time of the testator's death, it is in fact a limitation on a life in being, and does not violate the rule of law. It is true that, as events have transpired since the death of the testator — to wit, by the death of his daughter, leaving a husband and children alive — the devise to the heirs would vest, if at all, before the expiration of the prescribed period. But the point of time at which the will is to be construed is at the testator's death. It is then that its language speaks. A devise must be then legal, or it must fail. It is not sufficient that on the happening of certain events the gift over may take effect, and, if originally limited to those events, would have been valid; but it must appear to be legal and valid in all the events which, at the time when the will takes effect, may by possibility occur. A limitation by way of executory devise to be valid must, *ex necessitate*, take effect within the prescribed period. If the event upon which the estate is limited, may, by possibility, not occur within that time, it is too remote. *Brattle Square Church v. Grant*, 3 Gray, 153, and cases there cited.

If, in the present case, the devise had been to the daughter for life, and on her death to her children in fee, but if the children or either of them should die without issue, in the lifetime of any husband of the daughter, living at the testator's death, then to the heirs of the testator, it would not have been liable to the objection of remoteness; because it would be limited over on an event which must occur within the allowed period, to wit,

a life in being at the testator's death. But although, at the time of the death of the testator, his daughter had a husband living, his subsequent decease was neither impossible nor improbable. In the event of his death, she might have contracted a second marriage and had issue by a husband who was not born at the time of the death of the testator. Such an event was certainly improbable, but it was not impossible, and so the devise over might by possibility not have taken effect during a life in being at the testator's death, and more than twenty one years thereafter. It was therefore void for remoteness.

Nor does it make any difference in the operation of the rule against perpetuities upon the devise in question, that the gift over might take effect, as being within the proper limits in relation to a portion of the estate devised, although void as to another portion, as being too remote. For instance; it might be contended that as to the portions of the estate which would go to the grandchildren of the testator, born during his life, or during the lifetime of his son in law living at his decease, the gift over was not open to objection on the ground of remoteness, although it might be as to the shares of other grandchildren, the issue of a second marriage of the daughter of the testator, and born after his death. But the difficulty is, that the shares of the grandchildren were contingent till the death of their mother. The trustees were to convey to the children then living. Those who had previously deceased took no vested interest, until the event happened. The fee remained in the trustees, who were to convey it to those of her children who survived her. Under this devise, therefore, it was possible that the entire estate would go to children of the daughter, born after the testator's death, and by a husband not then living. Such might be the result, if the children of the first marriage should die before their mother; and in that event the whole estate would be limited over on a contingency too remote. As the validity of the gift over must be determined on the principle that it cannot by possibility take effect beyond the period allowed by law, it follows that this devise must fail, because the limitation to the heirs is made to depend on an event

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which may not happen until after that period has expired. The possibility, however remote, that the limitation may not take effect within the time fixed by the rule, is fatal to its validity. Lewis on Perp. 170. *Newman v. Newman*, 10 Sim. 51. *Dodd v. Wake*, 8 Sim. 615. See also *Challis v. Doe*, 18 Ad. & El. N. R. 231, 247.

The entire devise over to the heirs must therefore fail as being too remote; and as the rule applies to every executory limitation by will, whether of real or personal estate, (Lewis on Perp. 169,) the whole of the property comprehended in the gift to the heirs of the testator must vest in the plaintiffs, free from the devastating limitation. The fee to be conveyed and the personal property to be transferred by the trustees to the plaintiffs, being subject to a gift over, which is void for remoteness, remain in them absolutely, unaffected by the limitation to the heirs of the testator. *Brattle Square Church v. Grant*, 3 Gray, 156.

We are inclined to the opinion that the gift over, being an executory devise, is void for another reason. By the will, the testator has given to his grandchildren the power to make a will and dispose of the estates given over to his heirs, if they shall have arrived at the age of thirty years at the time when they are to receive the property from the trustees; that is, on the death of their mother. One of the distinguishing features of an executory devise is its indestructibility by the first taker. Here is a power of disposition expressly given to the children, which is inconsistent with the gift to the heirs. See *Holmes v. Godson*, 35 Eng. Law & Eq. R. 591, and cases cited. But it is unnecessary to determine this point, and we forbear to express an opinion upon it.

Decree for the plaintiffs.

EDMUND J. BAKER & others vs. ELEANOR J. W. BAKER & others.

The word "descendants," in a will, cannot be construed to include any but lineal heirs, without clear indications, in the will, of the testator's intent to extend its meaning.

A testator devised and bequeathed all his property to trustees, and directed them to pay certain debts and legacies, to allow his wife and son the income of certain real estate for life, and to advance a certain sum and lend certain apparatus to W., who had been employed in the testator's business, to be used in that business, he paying the testator's son one quarter of the net profits, so long as the son should not be concerned in similar business, and if the son should break this condition, then this sum to fall into the residue of the estate; and further directed that the income of his property, after fulfilling the above provisions, "and as the same shall fall in from time to time by the termination of life or otherwise, and also the principal of said residue," should be disposed of as follows: One third of the income to his wife for life, one third to his son for life, and the remaining third to his daughter for life; at the death of the wife, "one half of the third of said income to which she would be entitled, if living," to the son, if surviving, and the other half to the daughter, if surviving; at the death of the daughter, "the proportion of said property, of which she was entitled to the income, shall go to her descendants, in such manner as the same, if her property as a feme sole, would descend or be distributed according to law;" and upon the death of the wife, if she should survive the daughter, one half of the third of the principal, of which she was entitled to the income, to go to the descendants of the daughter in like manner; and if, at the time when the descendants of the daughter, if any, would be entitled to any of the principal, there should be no such descendants, then it should go to the son's descendants; and added similar provisions as to the son and his descendants; and provided that if, at the time of the termination of the trust for the payment over of the income of the whole or part of the property, there should be no descendants then surviving of the son or daughter, then such whole or part should go to certain charitable institutions. *Held*, that upon the death of W., the sum advanced and the apparatus lent to him were to be added to the residue of the estate; and that, upon the death of the daughter, without issue, in the lifetime of her mother and brother, one third of the residuary fund should be paid to the children of the brother at that time, and their issue.

THIS CASE was argued in writing at a former term by *J. M. Churchill*, for the plaintiffs, *E. D. Sohier & C. A. Welch*, for Eleanor J. W. Baker, *W. Richardson*, for Walter Baker, and *E. L. Pierce*, for Florence M. Baker.

SHAW, C. J. This is a suit in equity, brought by Edmund J. Baker, John H. Robinson and Jonathan French, trustees under the will of Walter Baker, late of Dorchester, who died on the 6th of April 1852, and whose will was duly proved and allowed, against Eleanor J. W. Baker, his widow, Walter Baker, his son, and Florence Mott Baker, a minor, granddaughter of the deceased, and daughter of his son Walter, and also the trustees of

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of the Massachusetts General Hospital, and the trustees of the State Reform School at Westborough.

The bill sets forth a certain article in the will, including a residuary clause, after various other devises and bequests not affecting the present question, which residuary provision directed the trustees to dispose of a considerable amount of property, for the benefit of his wife, Eleanor J. W. Baker, his son, Walter Baker, and his daughter, Edith Baker, all of whom survived him. The article in question is as follows :

" Article ninth. The rents, interest and income of all the residue of my property remaining after fulfilling the above and subsequent provisions, and as the same shall fall in from time to time by the termination of life or otherwise, and also the principal of said residue, shall be disposed of as follows, viz. : One third of such rents, interest and income shall be payable (semi-annually or quarterly as may be convenient) to my said wife Eleanor J. W. Baker, during her life ; one third of the same to my said son Walter Baker during his life ; and the remaining third to my daughter Edith Baker, on the receipt of her guardian during her minority, and on her own separate receipt after her majority or marriage, dated on or after the end of each quarter or half year as the same may be payable, and independently of any husband she may have, during her life.

" At the decease of my said wife, one half of the third of said income to which she would be entitled, if living, shall be paid to my said son Walter during his life, if he survives her, and the other half shall be paid to my said daughter Edith during her life, if she shall survive my said wife, in the same manner as above provided for the payment of income to her.

" At the decease of my said son Walter, the proportion of said property, of which he was entitled to the income, shall go to his then surviving descendants, in such manner as the same, if his property, would descend or be distributed according to law. In case my said wife shall survive my said son, then at her death one half of the said one third of the principal, of which she was entitled to the income, shall go to the descendants of my said son in like manner.

“ At the decease of my said daughter Edith, the proportion of said property, of which she was entitled to the income, shall go to her descendants, in such manner as the same, if her property as a feme sole, would descend or be distributed according to law. And in case my said wife shall survive my said daughter, then at her death one half of the said one third of the principal, of which she was entitled to the income, shall go to the descendants of my said daughter in like manner.

“ If, at the time when the descendants of the said Walter, if any, would be entitled to any of said principal, there should be no such descendants, then the same shall go to the descendants of said Edith, if any, then surviving. And if at the time when the descendants of said Edith, if any, would be entitled to any of said principal, there should be no such descendants, then the same shall go to the descendants of said Walter.

“ If, at the time of the termination of the trust for the payment over of the income of the whole or any part of said property, there should be no descendants then surviving of the said Walter or Edith, then the whole or part of said property on which the trust shall have so terminated shall go to and be equally divided between the Massachusetts General Hospital and the Massachusetts State Reform School at Westborough.”

The bill then, after averring that the trustees accepted said trust and were duly commissioned as such, alleges that the testator left said Eleanor, his widow, Walter Baker, a son of full age by a former marriage, and Edith, an infant daughter of himself and said Eleanor, and no other children or issue ; that said Walter, the son, had a lawful child born on the 5th of August 1852, named Florence Mott Baker, who still survives, but has no other child ; that on the 21st of July 1853 Edith, the daughter, died, leaving no issue, but leaving numerous collateral kindred, both on the paternal and maternal side.

The plaintiffs then, after setting forth various facts in detail in relation to the property of the testator, and alleging that they have property on which this residuary article of the will may operate, state that they are desirous of distributing, paying over and disposing of the same, according to the true and legal effect

of said will, and their duty in the execution of the same ; but that various and conflicting claims are made to said property or parts thereof, by the said Eleanor J. W. Baker, by the said Walter Baker, by said Florence Mott Baker, infant daughter of said Walter ; and that other claims may be made thereon by other children of said Walter, who may be afterwards born, and also by the trustees of the Massachusetts General Hospital and the trustees of the State Reform School at Westborough. They then aver that they are in great doubt as to their power and duty in the premises, and pray for the instructions of the court.

The answer of Eleanor J. W. Baker admits most of the facts as stated, and admits that said Edith died unmarried and without issue ; but insists that she left a half brother, to wit, said Walter, and a mother, to wit, herself, and claims that the property ought to be divided between them, and denies all claims of any others conflicting with this claim.

The answer of Walter Baker admits all the facts stated in the early part of the bill ; and after stating his claim under the will, in his own right, to one third of the income of the residue of the real and personal estate, as stated by the plaintiffs, further claims and contends, that he, said Walter, is entitled to have paid to him, under said will, the principal of one half of the other third, to the income of which said Edith, deceased, was entitled by the will ; also the income accrued on said half, not paid over to said Edith's guardian, before her decease, as well as the income accrued since her decease ; and does not deny the claim of said Eleanor to the other half.

Further answering, he makes a specific claim to the benefit of the \$15,000 directed by his father to be advanced to Sidney B. Williams to carry on the chocolate business, of the profits of which this defendant was to have one quarter. He claims to have the whole \$15,000 paid over to him, or to have it invested, and the income paid over to him, with the income accrued since the death of said Williams. And he avers that he has never violated any condition of the will, or forfeited or impaired his special claim to this \$15,000. He makes the same claim to the

pans, moulds and apparatus used in the chocolate business. And he denies all claims of any parties to this suit, conflicting with his said claims, and prays the court to protect his rights and interests.

Florence Mott Baker, in her answer, claims all the rights in the real and personal property of her grandfather, Walter Baker, deceased, of her aunt, Edith Baker, deceased, by virtue of said will, which the plaintiffs in their bill state that she claims, and such other rights as the court shall find just and lawful, and leaves the plaintiffs to make proof of all facts alleged, which may be to her disadvantage. She denies the respective claims of her codefendants, Eleanor J. W. Baker, and her father, Walter Baker; contends that other issue of her father, hereafter to be born, will not be entitled to any of the property set forth; and prays that, if any of the codefendants shall be found to be entitled to the income of any of said property, the principal may be safely invested for her sole benefit, to become hers absolutely and exclusively on the decease of the party entitled to the benefit of the income thereof. She further says that she is an infant of three years old, and submits, reserving all benefits.

It is necessary, in order to put a right construction upon the ninth article of this will, directing the ultimate disposition of both income and principal of the property, to consider the whole scheme of the will, and to ascertain from it, if practicable, the true intent and purpose of the testator, in order to understand each provision.

In the first place, he devises and bequeathes his whole property, real and personal, with one exception, in the broadest terms, to executors and trustees after named, their successors, heirs and assigns, for the purposes, and subject to provisos and directions, thereafter expressed.

As the property is given to the executors and trustees, and they are not all of them the same persons, the widow being an executor but not a trustee, and French being a trustee but not an executor, although two are the same, there might be some ambiguity as to the vesting of the legal estate, though no question is raised upon this subject. The trustees sue, and they

aver that they have been duly commissioned by the probate court, and this is admitted. We suppose the effect of such a gift, if any question were made, would vest the property in the first instance in the executors; and after they have appropriated enough of the property to pay debts and legacies, and enable them to perform all the duties of executors, the residue would vest in the trustees.

The effect of making a will in this form is, to make no legal devise or bequest, except to the trustees; but the effect of all the provisions for the widow, children and all other beneficiaries under the will, is to create equitable interests only, according to the directions given; and the gift to the trustees is an absolute devise in fee of the real estate, and an absolute gift of the personal, large enough to feed and nourish all the trusts created by the will. Whether this consideration would make any difference in construing words and clauses usually employed to create legal devises and bequests, when used as declarations of trust, designed to enlighten and direct the understanding and consciences of trustees, in administering trust property, may be doubtful; perhaps not precisely the same legal technical terms should be required, as in creating legal estates and interests.

One difference, we suppose, is obvious; that where clauses in a will, providing for various events, might create contingent remainders, which would be in danger of failing from the want of proper particular estates to support them, up to the time of the happening of the contingency, such danger would be avoided by such a will as the present, where the fee is all along vested in the trustees, for the purpose, among other things, of meeting all such contingencies as they may happen.

We are then to take a general view of the will, construing all the provisions, after the first article, as declarations of trust.

Article 2 directs the payment of debts; and article 3 gives a large amount of personal property, furniture, &c., notes and money to the wife, to her absolute use and disposal. The next clause gives her real estate in Dorchester for her natural life, without restrictions. The remaining part of the same article gives her mills and other real estate, for life, subject to cer-

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tain provisions. Article 4 directs the trustees to allow his son Walter the use, rents and profits of mills and other real estate, described, for life. In neither of these cases is any special direction given, in terms, as to the equitable reversions expectant upon the termination of these life estates, to the widow and son.

The residue of article 4, together with article 5, contains directions about carrying on the chocolate business, under Sidney B. Williams, then in the testator's employ, on a share of the profits; and the general effect of these directions is, that the trustees are to advance him \$15,000, and, if necessary, more capital; and that he is to have, at a fixed rent, the exclusive use of the mills and apparatus for making Baker's chocolate, and to use his name, allowing his son Walter one quarter part of the profits, in case he shall not carry on the same business, or suffer his name to be used in carrying it on.

Article 6 directs, that if his son Walter should die leaving a widow, the trustees should pay her, or purchase for her an annuity of \$1,200.

Article 7 is erased. Article 8 directs donations in money to Bible and Missionary societies.

Article 9 provides for the disposition of the income and principal of the residue, upon which the question in this case arises. We shall recur to this presently.

Article 10 gives full power to the trustees to sell, convey, mortgage or pledge any property, real or personal, with the approbation of the judge of probate.

Article 11 gives certain pecuniary legacies.

In article 12 he directs the trustees, that his son Walter shall have the letting, management and control of estates in Dorchester, of which he is entitled to the income, subject however to the discretion and interposition of said trustees.

Article 13 excepts, out of the devise of the whole property to trustees, certain estate in Ohio. In case his wife should marry again, he then gives the rent of house in Summer street to his daughter Edith, in the same manner as before directed in case of income payable to her.

Article 14 is a nomination of executors and trustees.

We think there are three leading purposes, manifested by the testator, in this will: First, after placing at his wife's use and disposal furniture, carriages and generally the means of maintaining a household establishment, to provide for her a large and liberal income during her life.

Second, to provide an income for his son and daughter during their respective lives, but in no event to vest in them personally any property other than income.

Third, to bring the property ultimately back, after the decease of his son and daughter, into the descending line of his own family, without deduction, except that of the interest and income thereof.

Perhaps no means more effectual could have been adopted to accomplish all these objects, requiring a provision for many and various contingencies, than that of placing the legal estate in trust, and making all the derivative rights thereto equitable interests only.

In coming back to the ninth article, which purports to make a disposition of the entire equitable estate, both income and principal, it becomes necessary first to inquire, what that residue consists of.

The devise to the trustees was of the entire estate, except the Ohio estate, which does not affect the question; then this article is a direction, in the nature of a declaration of trust, in relation to this whole estate. There is no other clause which purports to be a direction for the disposition of the trust estate.

The first line of article 9 declares what this residue shall be composed of, viz.: "the rents, interest and income of all the residue of my property remaining, after fulfilling the above and subsequent provisions, and as the same shall fall in from time to time by the termination of life or otherwise, and also the principal of said residue."

The first inquiry is, what is to be first deducted for fulfilling the above and subsequent provisions of the will, in order to form this residue. This must obviously include all moneys paid for charges and expenses, for debts and pecuniary legacies and

other direct gifts, and all the personal property directed to be given absolutely to the widow, to be at her disposal. Deduct also all the real estate in Dorchester and Boston, the income of which is given to the widow for life, all the real estate given to her for life, subject to conditions, and also all the real estate the income of which is given to Walter for his life, and all money and property set apart for carrying on the chocolate business, until repaid and thus brought back into the trust fund.

Then the actual residue, when the bill was brought, as stated by the plaintiffs, would stand thus :

Real estate not appropriated to any of the above

purposes, valued at \$ 2,460.00

Personal, not so used 25,251.17

To this, we think, must be added the sum advanced to Sidney B. Williams, according to the directions of the will, to enable him to carry on the chocolate business. This was not a gift, but a loan and advance to Williams by the trustees out of the assets, for which he was to be accountable. This business was to be carried on "in case the said Williams shall be ready and so long as he shall continue to be ready to comply with the preceding provisions." This was plainly founded on the personal confidence which the testator had in the skill and prudence of Williams, who was at the time in the employment of the testator on a share of the profits. But the continuance of this business, under these circumstances, depended on the life of Williams, and when he died the business must terminate, and the loan of \$15,000 become payable. The advance was made out of the trust fund, and when repaid would come back into that fund; indeed, as money or as a debt due, this sum was all along a part of the residue; but so long as it was used as capital it was not a part of the trust fund, yielding interest.

Upon a comparison of dates, it appears that Edith died on the 21st of August 1853. It is stated in Walter Baker's answer, and we suppose it is true, that Sidney B. Williams survived and carried on the business, upon the terms specified in the will, by the aid of the \$15,000 so advanced to him by the

trustees, until the 2d of July 1854, when he deceased, after which the said \$15,000 was repaid to the trustees and became part of the fund. But the same dates show that at the time of Edith's decease this \$15,000 was not a part of the fund of which Edith was receiving the income, and therefore was not a part of the principal, to be divided and distributed at Edith's decease. It was, for the time being, loaned without interest to Williams, in consideration of his carrying on the business, and allowing and paying one quarter of the profits thereof to the testator's son Walter. The same considerations apply to the moulds, pans and apparatus lent to Williams.

We may as well say here, as anywhere else, that the claim of Walter, the son, to be entitled to these two last mentioned sums, or to the income of them, because, whilst Williams carried on the business, he, Walter, was to have a share of the profits, is not well founded. That was a share of the profits of the business, and must necessarily cease, when the business ceased. Besides, that share of one quarter profits seemed intended as a compensation to Walter for relinquishing a right, which he would otherwise have had, to carry on the chocolate business, and so to secure to Williams exclusively the enjoyment of the good will and good name of Baker's chocolate, supposed, no doubt, to be of value. This was effected by making the receipt of such share of the profits by Walter dependent on a condition that he would not carry on the business, or lend his name to any other person. This restriction ceased with the business, which depended on Williams's life, so that by his decease this restriction on Walter terminated, and left him at liberty to set up the business, if he should choose to do so. There is no intimation in the will that Walter was to have any other right or interest in this sum of \$15,000, except as one quarter of the profits of the business; and that having ceased, we think this sum falls into the residue, to be disposed of with it.

Another very important part of this residue, in our judgment, consists of the equitable reversions or remainders expectant upon the termination of the equitable life estates given to the widow, and upon the termination of the life estate given to

Walter. That the testator considered these equitable reversions as constituting an important part of the residue, appears from the words "residue of my property remaining after fulfilling the above and subsequent provisions, and as the same shall fall in from time to time by the termination of life or otherwise." They had fulfilled these conditions in regard to the mansion house in Dorchester and the house in Summer street, by putting the wife in possession, according to the will, to hold for her life. The trustees held the fee of these estates; they fulfilled their duty in appropriating them for the life of the widow, which, upon her death, will terminate, and by the very terms of the will leave the estates to form part of the residue, to be appropriated and disposed of under this article, under the name of "principal of said residue."

Besides, if these equitable reversions are not embraced in this residue, then there is no clause or provision of the will relative to the disposition of them by the trustees, though constituting ultimately a very large part of his estate.

But the court are of opinion that this will did provide for payment out of the income of this residue, and ultimately for the distribution of the principal thereof, and by such distribution for the termination of the said trust. The provisions are somewhat peculiarly expressed, and it is perhaps a little difficult to discern the true and exact meaning, and it requires an attentive and careful examination to ascertain it; but we think, upon such examination, that the meaning will appear intelligible.

We have already suggested, what is apparent by the general scheme, as well as the specific provisions of the will, that the intention of the testator was, that beyond the property given absolutely to the wife, and also to the son, if any, and not coming into this residue in trust, neither wife, son nor daughter should have personally any portion of the principal of this residue, but only certain income therefrom during their lives. Of course, the principal must go elsewhere.

The first clause in article 9 is introductory only, and declares an intent to direct the disposition of the income of all the said residue, and also the principal of said residue; the residue of

said article looks to the various contingencies which may arise, and directs what shall be done on the happening of each of these respectively.

His attention is first drawn to the income; and this he directs to be paid, one third to his wife for life, one third to his son for life, and one third to his daughter for life.

During the joint lives of wife, son and daughter, nothing was to be done by the trustees, but to keep the formed residue well and safely invested, collect the income thereof and pay it, a third each to wife, son and daughter. Their being constituted trustees to hold funds, and pay over the income annually or oftener, implies a duty on their part to keep the funds safely invested in order to raise and pay the income.

The first contingency looked to was the decease of the wife, both the son and daughter being then living. This event, it is manifest, would not only terminate the widow's claim to one third of the income of the formed residue, but would terminate her life estate in the Dorchester and Summer Street estates; thus these equitable reversions would fall into the residue, and the rents and profits serve to swell the income from that residue. Or, to speak more accurately, though these estates all along formed part of the residue, so that the decease of the widow would neither enhance or diminish the principal of such residue, yet it would relieve it from the payment of these rents and profits, which were payable to the wife during her life, and leave the fund by so much the more productive and profitable.

In this contingency, the decease of the wife, he directs that one half of the third of said income, to which she would be entitled, if living, shall be paid to the son, if surviving, and the other half to the daughter. Here then arises some difficulty in ascertaining the testator's meaning. She could not, if living, receive one third of rents and profits of estates, of which, during her life, she was entitled to the whole, simply because she could not survive herself, or be deceased and living at the same time. But this, we think, would be too literal a construction and would not carry out his intent. That intent was to put his whole estate in trust, subject to debts and specific legacies, and

also to a temporary charge of the rents of a large real estate for the life of his wife, and for her benefit. Subject to these deductions and charges, the whole estate constituted the residue, being the bulk of the estate ultimately intended to go to the lineal descendants of the testator, if any. This he proposed to accomplish, not by giving the property to his son or daughter, but by placing it in trust, to secure to them the income till both or one should die, and for that purpose the whole property was ultimately to constitute the residuum. But this residue might increase or diminish. It might increase by calling in debts or loans, or diminish by losses or bad investments. The testator contemplated that, after all the charges on his estate, and the creation of life interests for temporary purposes, there still would be a residuum; and it appears by the facts, that there was a residuum, both of real and personal estate. In the ultimate and final distribution of this residue, whether larger or smaller, and, as it must be ultimately, much enlarged, by the termination of the equitable life estates to the wife and son, he had directed the income of this residue to be paid to wife, son and daughter, one third each; when, therefore, he says that, on the decease of his widow, one half of the third payable to her should be paid to the son, and one half of the same third to the daughter, to which the widow would be entitled, if living, he means one half of one third of the general residue to each. The words are descriptive of the income to be divided, which is the same income to which she was entitled by the will, and which she would have continued to receive but for the event of her decease. The result then would be, that as each of these was entitled personally to one third of the whole income before the death of the widow, adding to each half of another third would be giving to the son and daughter one half of such income. This is not only consistent with, but is a construction promotive of the general intent. In no event was the widow to receive any portion of the principal; the provision for her was wholly income. No distribution of the principal was to be made at her decease, if the son and daughter were both living. The previous gift of the income of one third of the residue to Walter and Edith was of

the income of one third of the whole residue, whether increased by the termination of life estates or otherwise; and it is to be presumed that it was the intent of the testator to increase their respective thirds to halves of the same income. And it is manifest from the context, that the trust was to continue, and the property remain in the hands of the trustees, and the income to be collected and paid by them to the son and daughter, during their joint lives. It is only upon the decease of Walter or Edith, that any principal is to be paid out. And again, if this is not the true construction, then no disposition is made of a part of the equitable reversion expectant on the termination of the widow's life estate, because the subsequent clause, authorizing the distribution of the principal, in which Walter and Edith were interested, extends only to principal, of which they respectively were entitled to the income. On this view of this clause we are satisfied that the words "said income to which she [the widow] would be entitled to, if living" do not limit the right of the son and daughter, upon her decease, to a part of the income of the residue, so as to exclude that arising from the termination of her equitable life estate, but include one half of one third of the general income, so as to give to each one half.

Both of the above directions were made on the contingency, that Walter and Edith respectively should survive. The next contingency contemplated by the will is the decease of Walter or of Edith, and we believe the directions in each case are alike. Take Walter; his death might occur in the lifetime of the widow, or after her decease. The will provides for both branches of the alternative. It is as follows: "At the decease of my said son Walter, the proportion of said property, of which he was entitled to the income, shall go to his then surviving descendants, in such manner as the same, if his property, would descend or be distributed according to law. In case my said wife shall survive my said son, then at her death [death of the wife] one half of the said one third of the principal of which she [the wife] was entitled to the income, shall go to the descendants of my said son in like manner." This embraces both branches of the alternative; but as this contingency has hap-

pened in regard to Edith, it may be better to make what remarks we have to make on the clauses of the will which relate to her.

The provision is thus expressed: "At the decease of my said daughter Edith, the proportion of said property, of which she was entitled to the income, shall go to her descendants." This, of course, looks to Edith's death in the lifetime of her mother, because he says in the next clause: "And in case my said wife shall survive my said daughter, then at her [the wife's] death, one half of the said one third of the principal, of which she was entitled to the income, shall go to the descendants of my said daughter in like manner."

Here we put the same construction on the clause describing the wife's interest in the residue, and hold that it intended one third of the whole residue, as existing after the termination of her life estates, and to which she would be entitled under the foregoing general clause in the will. But in the event of Edith's dying in the lifetime of her mother, then the principal to be paid out is necessarily limited to one third of the actual fund in the hands of the trustees, yielding income.

This is in truth the actual contingency which has happened—the decease of Edith the year after the death of her father, her mother, the widow, then and still surviving. This part of the will is perhaps the only part which, strictly speaking, requires the judicial action of the court at the present time; but it seemed proper, if not necessary, to take a wider view, in order to a satisfactory exposition of this particular provision.

We have said that in this contingency—the death of Edith, during the life of the mother—the amount to be paid out to those who claim in right of Edith must be limited to one third of the actual fund in the hands of the trustees, and cannot include the equitable reversions expectant on the termination of the wife's life estate; because that part of the residue held by the trustees yielded no income, and was not a portion of the principal, of which Edith ever was, or, in the event that happened, ever could be entitled to the income. All the residue of that fund in the hands and under the control of the trustees, capable of yielding

income, must be retained by the trustees, and the interest upon it be collected and paid to the wife and surviving brother, in the same manner as if Edith had not died. They were entitled to continue to receive their full share of income, which they could not do if any of the principal yielding it were withdrawn. But paying out that part of the principal, of which Edith, up to the time of her decease, was entitled to the income, would leave the income accruing to the wife and Walter, after Edith's decease, wholly unaffected. We cannot believe that it was the intent of the testator that any disposition was to be made of these equitable reversions during the life of the widow. We denominate them equitable reversions; it would be more accurate to say they are parts of the testator's estate, of which the widow receives the whole income during her life. They cannot, therefore, come under the description of property of which Edith was entitled to the income, nor, at her decease in the life of her mother, be distributed as such.

It may be well to look at the alternative clause of this will, and see how it is further to be executed upon the decease of the widow, in order to ascertain whether the construction adopted will harmonize the various parts and render them symmetrical, so that they will correspond with each other.

Supposing that portion of the actual trust fund, capable of yielding income, consisting of cash, securities or real estate, being one third in her own right, to be now paid out to any one claiming in the right of Edith, being that portion of the principal of which she was entitled to the income, and then her mother should die. Two things would occur: first, one half of the one third of the residue, consisting of the specific fund, in the hands of the trustees, for Edith or those who will stand in her place, the income of one third of which, till then, went to the widow, will become distributable; and second, the equitable remainders will become estates in possession, capable of being sold to raise money, or conveyed by the trustees to the *cestuis que trust* in execution of the trust, or partitioned. It appears to us, that this was the period to which the testator looked forward for the disposition and final settlement of one half of his estate

and the closing of the trust in regard to such half, to wit, upon the death of the widow after the death of Edith or Walter, or the death of Edith or Walter after that of the widow, whichever of these contingencies might in fact first happen. And the same seems to us to be true, in regard to the other half; that half of the settlement will be finally completed, and the trust in relation to it closed, after the decease of both the widow and Walter, whichever may die first. The trust, we consider, is to last as long as either of the three live, to collect and divide the income. Should the mother die first, still the trust is to continue, to collect and pay over the income between Walter and Edith. But upon the death of either Walter or Edith, after the mother, or upon the death of the mother after either of them, then one half of the estate is to be paid out and finally disposed of, the other half yielding the same income to the survivor as before. When both have died, after the death of the widow, or upon the death of the widow after the decease of both of them, then the whole is to be paid out, or otherwise conveyed by the trustees, and the trust closed. One half on the death of each; of course, the whole on the death of the survivor.

This view gives significance to the last paragraph in this article, as follows: "If, at the termination of the trust for the payment over of the income of the whole or any part of said property, there should be no descendants then surviving of said Walter or Edith, then the whole, or part of said property, on which the trust shall have so terminated shall go to and be equally divided between the Massachusetts General Hospital and the Massachusetts State Reform School."

Several things are observable upon this clause. We think it looks to the final close of the settlement of the estate by the trustees, designated as the termination of the trust, and that that period or termination of the trust will take effect, as to one half, upon the death of the son or daughter, or wife, whichever may first happen; and, as to the other half, upon the death of the survivor, and also the wife. Another remark suggested by this clause is, that it directs the disposition of "the whole of said property." It does not now speak of the "residue," or the

"property yielding income," or "in the hands of the trustees," but "the whole property," without any qualification. The reason is obvious; the equitable life estates both to wife and son, and all temporary appropriations of any part of the estate, for any purpose, will have ceased, and the whole estate is then to be disposed of by the trustees. If the widow should die first, there would be but two periods of distribution of principal, namely, at the death of the son and daughter respectively. If the son or daughter should die first, there may be three periods of distribution, one at the death of each son or daughter, and another at the decease of the widow.

In the event which has happened, therefore, the decease of Edith in the lifetime of the widow, an account must be taken of all the property held by the trustees for the purposes of investment, and yielding income at the time of the decease of Edith, excluding, of course, that part assigned to the wife for life and to the son for his life, for of that they were respectively entitled to the income; excluding also the money lent out of the fund to Williams, as capital for carrying on the business—it being then employed by him—and also the moulds, pans and apparatus; excluding, also, all other property, if any, specially appropriated by the will, so that it was not, at the time of Edith's decease, part of the general residue yielding income.

Upon the amount being thus ascertained, we think it will be a case for a decree for the payment of one third thereof to the party entitled by the will; who that party is, is the subject for the remaining inquiry, to which we proceed.

The clause in the will upon which this question arises, is as follows: "At the decease of my said daughter Edith, the proportion of property, of which she was entitled to the income, shall go to her descendants, in such manner as the same, if her property as a feme sole, would descend or be distributed according to law."

It is insisted on the part of the mother and half brother of Edith, that the word "descendants" is used synonymously with "heirs," and therefore that this direction to the trustees vests the equitable property in them, as her heirs at law.

The court are of opinion that this proposition is untenable. The question is, how the testator understood this term, and in what sense he used it. The verb "descend" is sometimes used in the sense of "pass by descent or inheritance," or "be inherited by." It is so used in our statute of descents, apparently to express by a single term, what might otherwise require a circumlocution. Rev. Sts. c. 61, §§ 1, 3. But when so used, it is usually accompanied by other words, which prevent all ambiguity. These phrases are, "shall descend to his father," "to his mother," to "his next of kin," which may be in the ascending or collateral line, as well as the descending; but in these cases these terms so qualify the word "descend," as to give the effect of "pass by inheritance" to the person named or described. We are aware of no authority, that either in a direct gift by will, or in a declaration of trust to the descendants of a person named, such bequest or declaration of trust would be construed to include, as a *descriptio personarum*, the heirs general of such person, including ancestors and collaterals. There must be very clear indications in other parts of the will that it was so intended by the testator, to warrant such a construction. Here it seems clear, we think, from other parts of the will, that it was not so intended; but was intended, according to the natural meaning of the terms, to limit the ultimate disposition to his own issue, if there should be any coming within the description.

The words "in such manner as the same, if her property as a feme sole, would descend or be distributed according to law," do not, in our opinion, alter the construction. Having directed that it should go to "descendants," which would include lineal heirs to the remotest degree, this clause directed how these descendants should take, as children, grandchildren, &c., and directed that it should be according to law, that is, by right of representation. Had it been intended to go to such persons as would take from her by descent, according to law, it would lead to a very different conclusion; and if such was the intent, it was so easy and natural to express it, that the failure to do so leads to the conclusion that it was not so intended. He first fixes the class of relatives who are to take, and then

the manner of taking. We think therefore, that "descendants" was a term used in its natural and ordinary sense, as a definite description of all those persons living at a particular time, who can trace their origin, immediately or remotely, to such person, as an ancestor.

Again; the next clause creates equitable cross remainders between the descendants of Edith and the descendants of Walter, in these words: "And if, at the time when the descendants of said Edith, if any, would be entitled to any of said principal, there should be no such descendants, then the same shall go to the descendants of Walter." And there is a similar gift over to the descendants of Edith, if Walter should die first without descendants. Now, as it is certain that one of the two must die first, and leave the other surviving, that other would be an heir at law of the deceased; and if "heirs at law" and "descendants" are intended in the will to mean the same thing, then, upon the construction contended for, such survivor must take by force of the very clause, which directs it to be given over, because there is no one answering the description to take the direct gift; in other words, it supposes an impossible case, which seems to be absurd.

Besides, the word "descendants" must be used in the same sense in the two clauses, by the first of which the proportion of the property, of which the brother and sister respectively took the income, shall, on the death of the first, go to the descendants of the decedent, if any, and by the other of which, if the decedent has no descendant, then to the descendants of the other, if any, whether such other be living or dead. Now a deceased person may have heirs, and a gift to the heirs of a person deceased, as a *descriptio personarum*, would be good, because they may be ascertained; but a living person can have no heirs, and a gift to persons so described would be void for uncertainty. The word being used in the same sense in both clauses, it could not be used as synonymous with "heirs" in the gift over, and therefore it could not be so used in the direct gift.

But although a living person cannot have heirs, he may have descendants, including all his issue; and who are the descend-

ants of a living person, at a particular time, is a fact susceptible of proof; and a gift to a class, by that description, is certain and valid, and the persons can be ascertained and identified by that description.

But it is argued that this could not have been the intent of the testator, because it might operate inequitably, by giving a large amount to a single child of Walter, without any provision for letting in after-born children.

If we are right in the construction of this will, in holding that upon the decease either of Walter or Edith, whether in the lifetime of the wife or after, there is to be a payment or distribution in part of the residue held in trust, it may follow, that in the event which has happened, the death of Edith in the lifetime of her mother, Florence Mott, the only child of Walter, will take the share now to be paid out, to the exclusion of after-born children. This may result from the rule, that when money is finally to be paid over and distributed, it will go to those who answer the description at the time when the gift takes effect by the happening of any contingency, though, if it were to happen at another time, there may be others answering the description. So, in the present case, the construction that we put on the will being, that on the death of Edith, living her mother, one distribution is to be made, and that upon the decease of the mother another distribution will be made, of that of which Edith, if living, would receive the income, it will go to the children of Walter, then living, including Florence, if she survive, because they would be persons answering the description, at the time fixed by the will for the distribution.

In considering this probable inequality among descendants of the testator, as bearing upon his probable intent, we must look at it under all the lights in which he saw it. In the first place, the direct gift to the descendants must embrace all the children, because even a posthumous child must be a descendant, no other could be born afterwards. Again; if, at the decease of one without issue, the other had died, leaving children, it must go to all of those who then survive. Again; until the decease of the widow, the large amount of the property assigned to her for

life would not be included in any distribution, on the decease of Walter or Edith. It was only in the remote contingency, which has happened, the decease of Edith in the life of her mother, leaving no issue, her brother surviving and having one child living, and in a position where, by possibility, there may be after-born children, that this inequality could arise, even in regard to the part of the property now distributable, and it cannot be presumed that such remote possibility could change the purpose of the testator. Besides, a leading purpose of the testator was, after providing amply for his widow, son and daughter for their entire lives, to bring the bulk of the estate back again into the line of his own family, as it should exist after the decease of his son and daughter, if there should be any such lineal descendants; and if this favorite object could be accomplished, we may reasonably conclude, that it was of less importance to him, how the property should be shared amongst those lineal descendants. We do not see how such a possible inequality could have been avoided without keeping this trust open and the estate unsettled during the entire lives of the son and daughter, which, young as they were, would have been extremely inconvenient and unreasonable. From such a possible inequality, therefore, had it been distinctly foreseen by the testator, we cannot infer that he had a different intent from that indicated by the plain and natural construction of the various parts of the will.

In weighing this claim of the mother and brother of Edith to the share of the principal now distributable on her decease, it must be understood that they claim under and by force of the gift to her descendants, and as such descendants; and not on the ground that this share is not disposed of by the will, and so is claimed by them as heirs at law, and as of property undisposed of by the will; it is in this view we have considered their claims. But had they claimed on the other ground, as property not disposed of by the will, it must have been equally unavailing the legal estate was in the trustees, the direction was to pay it, in case of Edith's decease, to her descendants, if any, and if none, to the descendants of Walter. If the mother and sister were not the descendants of Edith, within the meaning of the

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will, so as to take under the first gift over, then the second gift over is a good declaration of trust, it clearly designates the descendants of Walter, Florence Mott is such descendant, and is entitled to the share payable by the trustees at Edith's decease, with the interest which has since accrued on it, computed at the rate which the fund has earned.

In regard to the sum actually due to Edith at the time of her decease, for interest, in strictness we suppose it must be paid to an administrator, it having become her personal property, and being a *chose in action*, and thus going to her personal representative. But as such a child could owe no debts, and as the mother and son were her heirs at law, alone beneficially interested in this small sum, it probably may be adjusted by mutual consent, without being formally embraced in the decree.

Having, as we believe, considered all the questions necessary to be considered in this case, the counsel for the trustees will draw up and present a decretal order of reference to a master, conformably to the grounds and principles hereinbefore stated, to be submitted to the court; and upon such reference all further orders will be reserved until the coming in of the report

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A child, living in its father's house, cannot maintain an action against a gas company for injury occasioned to it at night, by the gas escaping from their gas pipes in the street opposite the house, over which the child and its father have no control, without proving want of ordinary care on the part of the company in keeping the pipes in repair, and ordinary care on the part of itself and its father; and any want of ordinary care in the father will defeat the action in the same manner as it would in the child, if of full age. And if the father knew of the leak early enough in the previous day to have had it repaired before night, by giving immediate notice to the company; or if the father, finding the escape of gas in the house at night to be dangerous, did not use ordinary care in withdrawing the child from the effects, by removing it out of the house, or otherwise; the action cannot be maintained, although the company's negligence contributed to the injury.

In defence of an action against a gas company, for injury occasioned by their neglect in repairing a leak in their pipes, evidence of their system and course of business in regard to complaints of such leaks is admissible.

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ACTION OF TORT, brought by an infant of nine years of age, by her father and next friend, for personal injury occasioned to the plaintiff, while of right in her father's dwelling house. The declaration alleged that the defendants, being the owners and possessed of certain gas pipes laid in the street, and used by them for conducting gas through the street and by and to said house, and being bound to keep them in repair and to keep the gas from escaping therefrom into said house, negligently permitted the pipes to be and continue out of repair, by means whereof large quantities of gas ascended and came into the house, and greatly incommoded the plaintiff and injured her health.

The answer put in issue the negligence of the defendants, the escape of the gas, and the injury to the plaintiff; and averred that any damage suffered by the plaintiff was occasioned by circumstances beyond the defendants' control, and by the want of due caution on the part of the plaintiff and of those having charge of her.

The trial was in this court, before the chief justice, who made the following report thereof :

" There was evidence tending to show that the plaintiff lived in her father's house in South street, Boston, which was supplied with gas through a supply pipe and meter from a main pipe laid down by the defendants along the travelled way of said street; that on the 26th of January 1854 a smell of gas was discovered in the premises of her father, by him, about eleven o'clock in the day, and was supposed by him to proceed from a leak in the meter of a barber's shop, kept by one Lennon, next door to the plaintiff's father's house, which meter was in the cellar under said shop, which cellar was occupied by the father as a coal cellar, and communicated by a door through a brick wall with his cellar kitchen; that the father then advised Lennon to notify the defendants of the leak, which Lennon promised to do at his convenience, and about half past two o'clock in the afternoon sent a notice to the defendants' office; that about three o'clock two servants of the defendants came to examine the leak, and found that it did not proceed from the meter or supply pipe of the barber's shop inside of the building, or from

the meter or supply pipe of Holly ; but found the gas coming through the partition wall of the coal cellar of Holly, under Lennon's shop, and through a fissure in the steps of a passage way, next to the barber's shop, and they thus inferred that the leak was in the street ; that this information was communicated by them to one Chittenden, superintendent of street leaks of the defendants, who came to the place of the leak between five and six o'clock the same evening, and after an examination, by which he found the leak to be in the street, he determined that, as it was dark, and the frost in the street very deep, it was the safest course, under all the circumstances, that the leak should not be repaired till morning.

" There was conflicting evidence upon the question whether Chittenden gave Holly and his family any caution as to the manner in which they should conduct themselves, in view of the leak ; witnesses upon the part of the plaintiff testifying that he did give such caution ; and Chittenden denying that he did so, but admitting that he told the barber that he had better keep his windows open, to let out the gas, until he closed his shop for the night — which was done.

" There was also evidence that Holly and his family were somewhat annoyed by the smell of gas during the evening, and took some precautions against explosion in the lower kitchen and cellar during that time ; that the plaintiff was put to bed in her usual sleeping chamber in the third story of the house, between eight and nine o'clock ; and when her father went to bed, about eleven o'clock, he, finding a strong smell of gas in his own room, went into his children's room, which was adjoining his own, and drew down the window a little way from the top ; that during the night, being annoyed and made sick by the gas, and fearing the children might suffer, he again went into his children's room, and drew down the window fully ; that, rising very early in the morning, he found the plaintiff on the floor, nearly insensible, and that she had been vomiting from the effects of the gas ; and that, upon being brought into the air out doors, together with medical treatment, the plaintiff recovered.

" About seven o'clock in the morning the defendants' servants

came and opened the street, and found and repaired the leak in the main pipe, about six feet from the junction of Lennon's supply pipe, and opposite to the wall between Holly's house and the barber's shop.

"It was admitted that the defendants were responsible for ordinary care of this main pipe; that the plaintiff or her father had no control over it; and that the gas did not leak from any pipe which either of them was in any way under obligation to keep in repair, or in which either of them had any interest.

"There was conflicting evidence as to what notice the defendants had of the leak, or whether any notice was sent by the father, other than as above stated; also as to the degree of diligence which the defendants used in repairing the leak; also as to its extent and danger; and also as to the degree of care used by the plaintiff's father, in protecting the plaintiff from the consequences of the leak in the night, the plaintiff being at school in the daytime; and there being no evidence that she knew of the leak — all which was submitted to the jury.

"Upon the question of due diligence by the defendants in repairing the leak, the defendants called one Johnson, one of their clerks, as a witness; and, after asking him what was done by the defendants' servants in regard to the complaint of the leak in this case, proposed to inquire of the witness, as tending to show due diligence, what was the system of the defendants in regard to complaints of leaks; and how they were usually treated by the defendants; and what was the course of business in regard to such complaints, in their office, and by their servants. To this the plaintiff objected; but the evidence was held admissible by the court.

"The plaintiff desired the court to instruct the jury upon these facts, 1st, that if they found the plaintiff was at home upon her own land, and the defendants permitted their gas to escape from their pipes in the street, where they had a right to have it, and to flow upon the plaintiff so as to suffocate and injure her, they would be liable in this action for suffering their gas so to injure the plaintiff, whether they were negligent or not in the use, care and management of their gas in the street.

"2dly. If the court should decline so to instruct the jury, but should instruct them that the defendants were only liable for want of ordinary care in the use of their gas; that if the damage to the plaintiff arose directly and immediately from a noxious substance, over which the defendants had the sole control for their own profit, being suffered by them to flow upon the plaintiff, it was for the defendants to show that the damage happened from unavoidable accident, or such a state of facts as would justify them, and render the plaintiff's loss therefrom. *damnum absque injuria*.

"3d. That a leak happening in the pipes of the defendants, and the gas doing damage to the plaintiff when she was where she had a right to be and remain, it was incumbent upon the defendants to show that it was repaired as speedily, and suffered to do as little damage as possible, by the exercise of due diligence, after they had notice of the leak.

"4th. That the damages happening from a leak in pipes, over which the plaintiff or her father had no control, and in which neither had any interest, any delay in notifying the defendants of the leak, after it was discovered, was not evidence of want of due care on the part of the plaintiff.

"5th. That under the facts of the case there was no duty upon either the plaintiff or her father in regard to the pipes; and so the question of due care did not arise, in this case, as to the leak.

"6th. That if any question of due care on the part of the plaintiff did arise in the case, then, the plaintiff being of tender years, the question of how much care and diligence ought to have been used by her, is to be judged of by the jury in reference to her age and capacity; and that the plaintiff's action was not to be affected by any want of care on the part of her father, if the jury should find her blameless, and that she had suffered damage by reason of the defendants' negligence.

"The presiding judge declined to give either of these instructions prayed for; but did instruct the jury, amongst other things, that to entitle the plaintiff to recover, under the circumstances of the case, she must show affirmatively:

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"First. That the damage happened to her from some want of ordinary care on the part of the defendants, either in laying down, managing or repairing their gas pipes; and that what was ordinary care must be judged of according to the subject matter, the force and danger of the material under their charge, and the circumstances of the case, and such as ordinary prudence would dictate.

"Secondly. That, in regard to the injury, the plaintiff must show affirmatively that she and her father, who had her in charge, were in the exercise of ordinary care; that any want of such care on the part of her father would defeat this action, in the same manner that such want of ordinary care would do, if she were of full age, and had shown the same want of care herself; or, in other words, that, being under the control of her father, she would bear the consequences of any want of ordinary care on his part, in reference to the injury she had sustained; and that if the plaintiff's father discovered the leak early enough in the day to have had it repaired before night, had he at once notified the company, and if in consequence of such want of notification the leak was not repaired that night, and the plaintiff was injured by the escape of gas therefrom, such delay of notification by the father would be evidence, to be considered by the jury, of want of such ordinary care as would defeat the plaintiff's action, although the defendants may have been negligent; and also that if the father, finding the escape of gas into his house in the night time to be dangerous, did not use ordinary care in withdrawing the plaintiff from its effects, by removing her elsewhere, or otherwise, he would thereby have contributed to the plaintiff's injury, and she could not recover in this action, although the defendants' negligence also contributed to the damage she had sustained.

"The jury found for the defendants. If either of the several rulings is erroneous, the verdict is to be set aside, and the cause to stand for trial; otherwise, judgment is to be entered for the defendants."

B. F. Butler & B. Dean, for the plaintiff. If the gas was poured by the defendants through their pipes upon the plaintiff

while at home, where she had a right to be, the defendants are liable for the injury to her, whether they were negligent in the management of their pipes or not. *Lambert v. Bessey*, T. Raym. 422. *Leame v. Bray*, 3 East, 599. *Brown v. Kendall*, 6 Cush. 292. *Underwood v. Hewson*, 1 Stra. 596. *Guille v. Swan*, 19 Johns. 381. *Covell v. Laming*, 1 Camp. 497. *Lotan v. Cross*, 2 Camp. 465. 1 Chit. Pl. (6th Amer. ed.) 143, 148. Steph. N. P. 210, 1004, 2362, 2630, 2634. The distinction between trespass and case is rendered immaterial by the practice act, St. 1852, c. 312, § 1.

In *Holden v. Liverpool New Gas & Coke Co.* 3 C. B. 1, relied upon by the defendants, the gas escaped by reason of the negligence of the plaintiff in not turning a stopcock within his house. And in *Moreton v. Hardern*, 4 B. & C. 223, and *Claftin v. Wilcox*, 18 Verm. 605, the only other cases cited by the defendants to this point, due care on the part of the plaintiff was not alleged.

The defendants, in order to excuse themselves from the injury occasioned to the plaintiff by this noxious substance, controlled solely by them for their own profit, were, at least, bound to show that it was the result of unavoidable accident. *Cole v. Fisher*, 11 Mass. 137. *Moody v. Ward*, 13 Mass. 299. *Gates v. Neal*, 23 Pick. 308. *Leame v. Bray*, 3 East, 599. Or, at least, that they repaired the leak as speedily as possible in the exercise of due diligence after receiving notice thereof.

The plaintiff and her father, being in their own house and upon their own land, could not be deprived of a right of action for an injury resulting from a leak in pipes over which they had no control, by remaining in their own house, or by a delay in giving the defendants notice of the defect; and so the question of due care on the part of the plaintiff does not arise.

If any such question does arise, the plaintiff's tender age and consequent helplessness and ignorance are to be taken into consideration in judging of the degree of care required. *Lynch v. Nurdin*, 1 Ad. & El. N. R. 29, approved in *Powell v. Deveney*, 3 Cush. 305. The negligence of her father cannot affect her cause of action. The father is not the servant or agent of the child — which is the only ground of the decisions holding one

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person bound by the negligence of another. *Hartfield v. Roper* 21 Wend. 615. *Thorogood v. Bryan*, 8 C. B. 115. If the father's negligence or wilful wrong contributes to the injury, is the child barred of its remedy against the other wrongdoer?

The evidence of the defendants' system of doing business was incompetent evidence of their having used due care in a particular instance.

C. P. Curtis & C. P. Curtis, Jr. for the defendants.

MERRICK, J. This is an action of tort, brought by the plaintiff, an infant of the age of nine years, to recover compensation for damages alleged to have been sustained by her in consequence of the negligence of the defendants in suffering their pipes to be and remain out of repair, whereby the gas contained in them escaped and inflicted upon her the injury complained of. Under our present system of pleading, an action of tort is sufficiently comprehensive to embrace all the cases in which a remedy was formerly afforded, either by an action of trespass or an action of the case. An action of tort may therefore now be supported by proof of facts which would have been sufficient to maintain either of those actions. *St.* 1852, c. 312, § 1.

But it is equally apparent, both from the plaintiff's declaration and from the facts and circumstances stated in the report, that no trespass has been committed upon her. All the evidence reported shows that the injury complained of, and for which she contends that the defendants are responsible, was not the immediate result of any act done or committed by them, or by any of their servants. The point in controversy at the trial was, whether it was not caused by their negligence or want of ordinary care. The distinction is obvious and well known. An injury is considered immediate, and therefore a trespass, only when it is directly occasioned by, and is not merely a consequence resulting from the act complained of. "If a person pour water on my land, the injury is immediate; but if he stop up a watercourse on his own land, or if he place a spout on his own building, in consequence of which water afterwards runs therefrom into my land, the injury is consequential, and will not render the act itself a trespass." 1 Chit. Pl. (6th Amer. ed.)

146. The defendants lawfully laid down their pipes in the public street, and filled them with gas. If they failed to discharge their duty in regard to its distribution, and negligently suffered it to escape, they were liable therefor to other parties for all consequential damages, and might be proceeded against for the recovery of compensation, in an action in the nature of an action of the case, but not as trespassers, in an action of trespass. This being the ground and limitation of the responsibility of the defendants, it is manifest that the plaintiff's first and second prayers for instructions were not applicable to the case, and were therefore rightly rejected.

It is not necessary to consider, particularly and in detail, the further instructions which were desired by the plaintiff's counsel. The propositions contained in them are all covered and embraced in the instructions which were actually given to the jury.

The defendants being authorized to lay down their pipes, and to convey gas in and through them, under the surface of the public streets, to various parts of the city, it is undoubtedly their duty to conduct their whole business, in all its branches, and in every particular, with ordinary prudence and care. No exact legal definition of these words, which will embrace all their meaning and be precisely applicable to every possible case, can be given. That is to say, there is no such thing in existence as an absolute standard of ordinary care and prudence, to which the conduct of individuals in each particular instance can be brought, and by which it can be compared and tested. Care and diligence should always vary according to the exigencies which require vigilance and attention, conforming in amount and degree to the particular circumstances under which they are to be exerted. But it must be equal to the occasion on which it is to be used, and is always to be judged of, as the jury were in this case accurately advised, "according to the subject matter, the force and danger of the material under the defendants' charge, and the circumstances of the case."

As this action is founded upon the alleged omission of the defendants to discharge their duty in keeping their pipes in a sound and safe condition for the transmission and distribution

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of gas, it was necessary for the plaintiff, in order to maintain it, to show that they failed, in this respect, to exercise due and ordinary care. The burden of proof was upon her to establish this failure as a fact. *Adams v. Cartisle*, 21 Pick. 146. *White v. Winnissimmet Co.* 7 Cush. 155. 2 Greenl. Ev. § 473.

It was also incumbent on her to prove that she herself used ordinary care for her own protection against the noxious influence of the gas. She had no right to expose herself carelessly or wilfully to its injurious effects, and thereby make the defendants responsible for the mischievous consequences resulting from such exposure. It was said by Lord Ellenborough that "a party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right." *Butterfield v. Forrester*, 11 East, 60. The case in which the rule of law was thus stated has often been referred to by this court with approbation, and the rights of parties determined according to the doctrine considered there to be established. *Smith v. Smith*, 2 Pick. 621. *Adams v. Cartisle* and *White v. Winnissimmet Co.*, above cited.

Nor does it make any difference that the plaintiff is a minor. She was under the care of her father, who had the custody of her person, and was responsible for her safety. It was his duty to watch over her, guard her from danger, and provide for her welfare, and it was hers to submit to his government and control. She was entitled to the benefit of his superintendence and protection, and was consequently subject to any disadvantages resulting from the exercise of that parental authority which it was both his right and duty to exert. Any want of ordinary care therefore, on his part, is attributable to her, in the same degree as if she were wholly acting for herself. And for this reason the defendants were properly allowed to show any conduct on his part, indicating a want of ordinary care in adopting suitable precautions against the hurtful effect of the gas after it was discovered to be penetrating and pervading the house where they resided. It was for the jury to consider whether there was not a manifest want of prudence in remaining in the house after it

became known to its inmates that it was being filled with the gas which was escaping from the leak in the pipes. And it was their province also to decide whether the immediate communication to the officers or agents of the gas company that such a leak had occurred was not a necessary, or at least a reasonable measure of precaution, of which those who were liable to suffer from inhaling a noxious substance ought to have availed themselves. In this view, it was competent for the defendants to offer proof of the conduct of the plaintiff and her father, that the jury might have the means of determining whether she had not herself neglected to use ordinary care in seeking relief, or resorting to expedients which might readily have been availed of for her own protection and security.

In the course of their defence, the defendants called Johnson, one of their clerks, as a witness; and having first obtained his testimony as to what was actually done by them, or by persons in their employment, after the fact of the leak came to their knowledge, they proposed further to inquire of him, as tending to show due diligence on their part, what was the system of the company in regard to complaints of leaks, how they were usually treated, and what was the established course of proceeding in applying remedies and making needful repairs on the part of their officers, and by their employees and servants. This inquiry was objected to by the plaintiff; but the objection was overruled, and the evidence admitted. And, under the particular circumstances of the case, we think the ruling was correct, and that the evidence was properly allowed to be submitted to the jury. Indeed, upon the broad and general question of due diligence, it seems indispensable to an intelligent and correct determination. The defendants, under their charter, were in the enjoyment of a great and peculiar privilege, that of supplying the means of light to all parts of the city. This devolved upon them a corresponding degree of responsibility in the conduct of their business, and in the preservation of every part of their apparatus from defects by which the public at large might be subjected to great inconvenience, and particular individuals might also be exposed to imminent peril and danger in respect

both to their property and their lives. They were therefore under the highest degree of obligation to be at all times in a state of the most ample preparation to meet, with all reasonable promptitude and dispatch, whatever exigency might occur requiring their attention. But it is manifestly impossible that they should have had at their service, at every moment and at every point of exposure, an adequate force to overcome a sudden fracture of their pipes, or any other casual and unexpected obstacle in the conduct of their affairs in the shortest possible time. All that they can reasonably be required to do is to afford ample facilities to all parties interested to make communications to them, to institute and maintain an efficient system of oversight and superintendence, and to be prepared with a sufficient force, ready to be put in action, and fully competent to supply and furnish a prompt remedy for all such accidents, defects and interruptions in the conduct of their affairs, as, from experience, and the character and peculiarity of their works, there was any reasonable ground to anticipate might occur. To know, therefore, whether due diligence has been exerted in any particular instance, it is necessary to know what is their general system, and what are the means of relief at their command, and within their control. If the system is all right, and all due preparation has been made in advance, and the force which can be commanded is applied in a proper manner to the reparation of a break in the pipes, or correction of any disturbance in the regular operation of their business, they cannot be held to have failed in the exercise of ordinary care, even though it should happen that, owing to the occurrence of several interruptions or leaks at the same moment of time, through an extraordinary state of the weather, or other unforeseen causes, a particular defect should fail to be overcome with the same promptitude and dispatch that it might be under other and more favorable circumstances. It was for this purpose, as the ruling of the presiding judge is to be understood, that the testimony of Johnson, objected to by the plaintiff, was admitted. It was not allowed for the purpose of showing that the company exerted the same degree of diligence in this as they did in other like instances

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nor was it ruled that they would be exonerated from responsibility on the occasion complained of by the plaintiff, if they acted up to the standard which they had themselves established as the rule of ordinary diligence. If this had been the object of the evidence it ought to have been rejected. But upon the more broad and general ground of exhibiting their system and plan of action, the means provided for conducting the great enterprise confided to their management and control, the evidence proposed seems to be peculiarly fit and appropriate, if indeed it ought not to be regarded as absolutely indispensable. Without it, it is difficult to see how, amidst contradictory statements and conflicting proofs, the jury could determine, with any confidence in the correctness of their conclusions, whether the defendants were supine and negligent, or acted with the vigor and efficiency demanded by the rule requiring the exercise of ordinary care and prudence.

The several rulings and instructions of the presiding judge, which were objected to by the plaintiff, appearing to us to have been all accurate and correct, judgment must be entered upon the verdict for the defendants.



HENRY W. BROWN, Administrator, vs. JOHN S. TYLER & others.

Where a mortgage of real property is assigned as collateral security for a debt other than the mortgage debt, and foreclosed by the assignee, by whom the land is afterwards sold, the debt to secure which the assignment is made is not paid by the foreclosure, but only by the actual sale and conversion into money; and where the debt so secured is that of another person, the right of action of the mortgagee against him as for money paid to his use is not barred by the statute of limitations until the expiration of six years after such sale and conversion.

ACTION OF CONTRACT for money paid to the defendants' use by Mary Kinsley, the plaintiff's testatrix. Writ dated June 18th 1853. Answer, the statute of limitations.

At the trial before the chief justice, there was evidence tending to show that Mrs. Kinsley, holding a mortgage of real estate

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from Samuel Gardner, one of the defendants, to secure his notes to her to the amount of four or five thousand dollars, on the 19th of September 1837, at his request, assigned said notes and mortgage to the People's Bank of Roxbury, who agreed in writing that upon payment of a note of \$4,000, previously made by all the defendants to the bank, the assignment should be void, and the mortgage and notes be reconveyed to Mrs. Kinsley; that the bank entered to foreclose the mortgage on the 15th of April 1839, continued in peaceable possession more than three years, and on the 19th of March 1844, in consideration of the payment to them of the amount of the \$4,000 note and interest, by Charles A. Winship, (who had purchased the equity of redemption,) sold to him all their interest in said note of the defendants, and in a judgment which they had recovered thereon, and also all their rights under said mortgage and possession.

The ground on which the plaintiff proceeded was, that Mrs. Kinsley had paid and extinguished a debt for which the defendants were liable, by applying her own funds, at the request of one of them, which was sufficient to bind them all, and therefore they were under an implied promise to pay her.

The opinion of the chief justice was thus expressed in his report to the full court: "I suppose the rule to be, that when a creditor receives of his debtor collateral security, consisting of chattels or choses in action or mortgaged real estate, after the chattels are sold and converted into money, or the debts and choses in action are collected and reduced to money, or the mortgaged real estate has become absolute in the mortgagee or assignee by foreclosure, which in law is taken to be equivalent to the payment of money and a discharge of the debt for which the mortgage is made, in either case it operates as a payment and extinguishment of the debt for the collateral security of which it is given. The giving it as collateral security for a particular debt was an appropriation to that debt; and when realized in money or money's worth, according to the terms on which it was given, it discharges it by operation of law, without the necessity of any receipt being given, or being carried to account in any book, or by any formal settlement of accounts

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"If this principle be correct, then the foreclosure of the mortgage by the bank, the mortgage being held as collateral security, enured as a satisfaction of the note and the judgment in which it was merged, being the debt to secure which it was given.

"I was of opinion, that if the transaction in question could be considered at all as the payment of the debt by Mrs. Kinsley, or out of her funds, so as to give her a right of action against the parties to the note, as for money paid to their use, it was by the assignment of a security of her own; and afterwards, on application of that security to the extinguishment of the debt, it was effected by operation of law by the foreclosure of the mortgage. That foreclosure took place on the 15th of April 1842, and then operated to extinguish the debt, and release the makers of the note from further liability. Then the right of Mrs. Kinsley accrued, if it accrued at all, to look to these defendants, and bring her action, as for money paid; and as she lived more than six years after that time, residing in the United States, and died in 1849, her right of action was barred by the statute of limitations."

On this opinion being expressed, a verdict was taken for the defendants by consent, subject to the opinion of the whole court upon the correctness of the above direction.

S. Bartlett & G. S. Hale, for the plaintiff, cited *Warren v. Emerson*, 1 Curt. C. C. 239; *United States v. Sturges*, 1 Paine, 525; *Burroughs v. United States*, 2 Paine, 569; *Moses v. Murgatroyd*, 1 Johns. Ch. 119; Story on Bailments, §§ 308, 320 & seq., 332, 342, 343; *Hoffman v. Johnson*, 1 Bland, 103; *Lee v. Baldwin*, 10 Georgia, 208; *Beall v. The Bank*, 5 Watts, 529; *Barrow v. Rhineland*, 3 Johns. Ch. 614; *Clark v. Henry*, 2 Cow 324; *Cunningham v. Rogers*, 14 Alab. 147; *Harrison v. Mock*, 10 Alab. 185; *Garlick v. James*, 12 Johns. 146; *Wilson v. Little*, 2 Comst. 443, and 1 Sandf. 351; *Huntington v. Mather*, 2 Barb. 538; *Stearns v. Marsh*, 4 Denio, 227; *Ontario Bank v. Hallett*, 8 Cow. 192; *Spencer v. Harford*, 4 Wend. 384; *Charter v. Stevens*, 3 Denio, 35; *Kingston Bank v. Gay*, 19 Barb. 460; *Turner v. Fendall*, 1 Cranch, 117; *West v. Chamberlin*, 8 Pick. 336; *Briggs v. Richmond*, 10 Pick. 396; *Porter v. Blood*, 5 Pick. 54;

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Leland v. Loring, 10 Met. 122; *Kemmil v. Wilson*, 4 Wash. C. C. 308; *Bell v. Banks*, 3 Scott N. R. 506.

C. B. Goodrich & J. W. May, for the defendant, cited 2 Greenl. Ev. § 524; *Amory v. Fairbanks*, 3 Mass. 562; *Briggs v. Richmond*, 10 Pick. 396; *West v. Chamberlin*, 8 Pick. 336; *Hedge v. Holmes*, 10 Pick. 380; *Morgan v. Plumer*, 9 Wepd. 287.

DEWEY, J. The statute of limitations being pleaded in bar, the question arises, At what period of time may it properly be said that Mrs. Kinsley paid, on account of the defendants, the money demanded in this action? If it be held that the foreclosure of the mortgage, transferred to the People's Bank by Mrs. Kinsley as collateral security for the debt of the defendants, was a payment by her as of that date, then the present claim is barred by the statute of limitations; but if the payment is to be considered as having been made at the period of the sale of the foreclosed premises, two years later, then it is conceded that the action was instituted in due time by her administrator.

The facts stated show that Mrs. Kinsley, at the request of the defendants, or of some of them, who were indebted to the People's Bank on a note for four thousand dollars, agreed to transfer to the People's Bank, as collateral security for such note, a mortgage which she held against one of the defendants, taking back a written stipulation from the People's Bank that the mortgage was received by them for the purpose aforesaid, and that, upon payment of the note of the defendants, her assignment of the mortgage was to be void, and the notes and mortgage securing the same were to be reconveyed to her.

The case turns wholly upon the question what was the effect of the foreclosure of this mortgage thus transferred as collateral security for the debt of a third person. Is the debt of such third person, to the amount of the notes secured by the mortgage, or the value of the land, if less than the notes, at once paid; or does the party, holding such mortgage as collateral, hold the land after foreclosure, as he held the mortgage before, as assets to be applied whenever they can be made available?

Now, while we fully assent to the doctrine contended for on

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the part of the defendants, as applicable to the ordinary case of mortgagor and mortgagee; and should hold that after a foreclosure by the mortgagee, it is to be taken as a payment of the debt secured by that mortgage, to the value of the land; yet it by no means follows that as between other parties, standing merely in the relation of pledgor and pledgee of said mortgage, the like consequence would follow. In general, where a party transfers to another goods, stocks or notes of hand, as collateral security for a preëxisting liability, the same are held in trust for the benefit of all parties; but only the actual proceeds realized from the sales, or payments, as the case may be, are to be accounted for. If, before the actual reduction of them to money, a rise in their value takes place, the assignor has the benefit of it. If a decline in price, the loss falls also on the assignor. It is only on the actual reduction of the pledged property to money, that the same is to be treated as a payment, and accounted for as such, and in the meantime the property is to be held as collateral. So also, we think, if a debtor, or a third person in his behalf, transfers a note secured by mortgage, and assigns both the note and the mortgage as collateral security for a debt; and the debt not being paid at maturity, the pledgee proceeds to enforce the collection thereof by a foreclosure of such mortgage, which is perfected by an entry and three years possession; as between pledgor and pledgee such foreclosure does not change the relation of the parties, nor does such foreclosure necessarily operate as a payment of the notes for which it was pledged as collateral.

In the opinion of a majority of the court, the foreclosure of the mortgage, by the party holding the same as collateral for the debts of a third person, did not, as respects himself and the party placing it in his hands, necessarily operate as a payment of the debt for which it was thus pledged. Such foreclosure was only one step in the process required to render available the pledge. The property, as well after foreclosure as before, was equally held in trust for the benefit of both pledgor and pledgee, and was to be disposed of for the benefit of all parties. On the one hand, the assignee, who held the same as collateral security, was not, in consequence of the foreclosure, required to take the

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land in payment, if he was ready and willing to proceed to reduce the same to cash by a fair and proper sale of the same; nor, on the other hand, would he be permitted to retain the same in his own right exclusively, regardless of what would be for the interest of the assignor. The property was holden in trust, first to pay the debt for which it was pledged, and, after enough had been realized to pay this debt, the bank was to hold the surplus for the benefit of Mrs. Kinsley. It continued thus to be holden after the foreclosure. The foreclosure of the mortgage of Gardner was no more a payment of the debt of the defendants to the bank than the assignment of the mortgage. The payment by Mrs. Kinsley is to be computed from the time the assets pledged to the bank were made available. This was at a later period than that of the foreclosure, and so much later as to take the case out of the operation of the statute of limitations as a bar, upon the facts stated in the report of the case.

New trial ordered.

WARDENS OF CHRIST CHURCH *vs.* GEORGE W. POPE.

The vote of a religious society, assembled at its annual meeting for the election of officers, that the officers shall be always chosen by ballot, does not invalidate an election of officers by hand vote at a subsequent annual meeting.

The election, by hand vote, of officers of a religious society, in which each proprietor has a vote for every pew which he owns, cannot be objected to, upon the ground of the inherent difficulty of thus ascertaining the result, after the election has taken place and the result has been declared.

The vote of a Protestant Episcopal Church to increase the number of vestrymen does not affect the rights and powers of the former vestrymen, until the additional members have been chosen.

A warrant of the vestry of a Protestant Episcopal Church, calling a meeting of the proprietors to elect officers, may be signed by the chairman and clerk only.

The vestry of a Protestant Episcopal Church have authority to call meetings of the proprietors.

The vestry of a Protestant Episcopal Church may transact business in the absence of both wardens, if a majority of all their members is present; even if it has been voted at several annual meetings, "that one warden and four vestrymen constitute a quorum for transacting business."

The reception of illegal votes at the election of officers of a religious society does not invalidate the election, if it does not affect the result.

Wardens of Christ Church v. Pope.

ACTION OF CONTRACT, commenced on the 19th of February 1855, by "The Wardens of Christ Church in Salem Street in Boston, the individual members whereof are Elias W. Goddard and William P. Parrott, a corporation duly established by law," to recover one quarter's rent, due December 15th 1854, of land in Chambers Street in Boston, under a lease from the plaintiffs, as such wardens, to the defendant. Answer, payment of said rent to William W. Mair and Edwin H. Sampson, legal wardens of said church.

Goddard and Parrott had been duly elected at the Easter meeting in 1853 wardens of the church for the ensuing year, and claimed to have been reëlected wardens in September 1854; but the defendant contended that Mair and Sampson were elected wardens in that month; and the question whether, at the commencement of this suit, Goddard and Pope were the wardens of Christ Church, and entitled to recover the rent demanded, was submitted to the decision of the court upon a statement of facts, so much of which as is material to the understanding of the opinion is stated therein.

J. A. Andrew & J. H. Wakefield, for the plaintiffs.

G. M. Browne, for the defendant.

DEWEY, J.* This is an action to recover of the defendant a certain sum of money alleged to be due from him to the wardens of Christ Church for a quarter's rent of certain premises held under a lease from them. The defence to the action involves the question of the validity of various proceedings of members of this religious society in the election of their annual officers in the year 1854, and more particularly who were the legal wardens of this society on the 15th of December 1854.

In deciding the present case, we shall assume, what seems to be conceded by both parties, that for some cause an occasion existed for resorting to the provisions of the Rev. Sts. c. 20, § 26 & *seq.*, for calling a meeting of the members of a religious society through the agency of a justice of the peace, upon the application of five members of the society, and that the meeting of

* METCALF, J. did not sit in this case.

May 24th 1854, called by Mr. Wakefield as a justice of the peace, was legally called. What seems to put the question beyond any further inquiry, is the fact that these plaintiffs, then holding the office of wardens, were a portion of those members who united in the application to Mr. Wakefield to call that meeting, and also that at the annual meeting previously called by the vestry it was voted to continue the business incident to the Easter meeting, under the organization to be had under the new call. It appears therefore that all parties to the present controversy united in the meeting of May 24th 1854, and recognized it as a legal meeting.

The meeting of the 24th of May was continued by adjournment to the 8th of June, when it was voted to "proceed to the election of vestrymen, and that the vestry consist of eleven in number, including the rector and wardens;" and the meeting then proceeded to elect by hand vote the eight vestrymen. No objection exists to the legality of the election of the eight vestrymen, except that they were elected by a hand vote. This is supposed to be illegal, because contrary to the rule of this religious society, meeting as the congregation of Christ Church, on the 6th of April 1724, when it was voted "that the church wardens and vestry be always chosen by a written vote;" and also for the further reason that the right to vote depended upon the ownership of pews, and a proprietor of pews was entitled to one vote for each pew he held.

As to the first of these objections, it is to be remarked that this was not the ordinary case of the corporate body making rules and by-laws for the government of their agents; but the vote of 1724 was that of a body assembled at their annual meeting for the choice of officers, and having no power over the election of officers at the next succeeding annual meeting. We are of opinion that such a vote could not have any binding efficacy upon those subsequently assembled to perform the like duties, and that such future body would have an equal right to determine the mode of electing the officers for the year ensuing, as their predecessors had.

The greater objection to this election is, we think, that aris-

ing from the inherent difficulty of voting by hand vote, where the individuals voting have more than one vote, as they might have in the present case. The more convenient way certainly would be to adopt the more usual practice of voting by written votes, and designating on each ballot the name of the voter and the number of votes he was entitled to give. The result might however be ascertained by hand vote, not by counting the hands merely, but by allowing to each hand raised the number of votes the person was entitled to. And we think this mode of election cannot be objected to, after the voting has actually taken place and the result been ascertained; and that it was not enough, after the election, for an individual member to give notice that he should at a future time move a reconsideration of the vote as to the manner of electing vestrymen, nor by filing a protest against such election at a subsequent meeting. There is nothing to show that the eight persons then declared to be elected did not receive a majority of all the votes of the voters present, computing the individuals who voted as entitled to all the votes for pews they represented. The objection should be taken earlier, or it is waived. We are therefore of opinion that the eight vestrymen, then declared elected, were legally elected and competent to discharge the duties of that office.

The next inquiry is as to the effect of the doings of the meeting of June 29th 1854, held by adjournment from the 8th of June. At this adjourned meeting of the proprietors, it was voted, apparently unanimously, "that the vestry be increased to a number not exceeding fifteen, and that eleven shall be a competent quorum." No further proceedings took place as to electing the four additional vestrymen; but the meeting was further adjourned to the 3d of August 1854, and again to the 11th of September, and from thence to the 18th of September. It is objected on the part of the plaintiffs, that after the votes above referred to, increasing the number of vestrymen, and making eleven a quorum, the eight vestrymen who had been previously chosen on the 8th of June could not act as a legal body, and especially could not act unless the whole eleven, including the rector and wardens, were present.

In the opinion of the court, the vote of June 29th on this subject did not affect the rights of the eight vestrymen, previously elected, to transact business and discharge the duties of vestrymen, the other four not having been elected.

The next inquiry is as to the validity of the proceedings of these vestrymen, who, in connection with the rector, on the 29th of August called a meeting of the proprietors, to be held on the 7th of September, to choose wardens, and for other purposes. If the vote of the persons acting as a vestry was a legal act, we perceive no objection to the form of the notice, it being under the hands of the chairman and clerk of that meeting. It was not necessary that it should be under the hands of the members of the vestry individually—that not being required by any statute, nor by law applicable to such cases.

As to the authority of the vestry to call a meeting of the proprietors, it does not seem to be specially provided for ; but, considering the nature of the duties devolving upon the vestry, we think, in the absence of any provision repugnant to such powers, it may be considered as falling within their legitimate authority to call meetings of the proprietors. Looking at the former practice of this particular society, it would seem to be more formal and authoritative than the usual mode in which such meetings have been called.

The strongest objection, in our view, to the validity of the calling of this meeting of September 9th is that to the authority of a vestry to act, in the absence of both the wardens. Upon this subject, we have not been furnished with any authority, establishing, as a general rule, the necessity of one of the wardens being present, to constitute a legal board of the vestry. The subject seems to be left without any direct authority upon this point. In many of the other states there has been special legislation as to the organization and management of the ordinary concerns of the Episcopal Churches, whereas in Massachusetts we have no such legislation at all applicable to the matter we are considering. In the absence of such special legislation, we would seek light from the most approved treatises upon the law of the Episcopal Church ; but they do not, so far as we have

been referred to them, meet this point. The vestry, it will be seen, consists of the wardens and the vestrymen, and the rector, as it may be, and is in the present instance. When thus assembled, they compose one body, and the majority decide, irrespectively of the concurrence of the wardens. It may be therefore, that whatever other independent powers they possess, yet when acting in this particular relation, and when considered as a component part of the vestry, they have only the same powers or votes as any other members of the vestry. In the absence of authority to the contrary, we assume therefore, that as component parts of the whole body, the rule applicable to other corporations would apply to them, and that the vestry would be represented by a quorum competent to act whenever a majority of the whole number of those composing the vestry were present.

This would be decisive of the authority of the vestry to act in calling the meeting of September 7th, unless the general rule that a majority will constitute a quorum, is qualified by a vote of the proprietors of Christ Church, passed on the 30th of April 1838, when it was voted "that one warden and four vestrymen constitute a quorum for the transaction of business." A similar vote was passed on the 4th of May 1840, and on the margin of the records of May 2d 1842, it is said, "one warden and four vestrymen constitute a quorum for the transaction of business."

The inquiry naturally presents itself whether these were votes intended to restrict the vestry from acting when a majority was present, and a quorum merely constituted; or an enabling vote, having reference to a large vestry, and for the purpose of authorizing action when less than a majority of the whole were present. The number required by this vote to be present was in fact less than a majority, and it may have been deemed expedient, when giving power to a minority to act, to provide that there should be present one of the wardens.

Another question also presents itself, whether the votes were intended as annual votes, applicable to the particular year in which they were passed, or as permanent in their application. The fact of their being repeatedly adopted would rather lead to

the inference that they were considered as limited votes, and not permanent ones, affecting the period beyond the year in which they were adopted. Without feeling that entire confidence in the correctness of the result to which we have arrived on this point, which we should desire, our opinion is, that these votes were not intended to restrain the vestry from acting when a majority of all its members were present; but were enabling votes, by which a minority might act, provided one warden and four vestrymen were present. Had it been otherwise, we should not expect any provision with regard to vestrymen, but a vote simply declaring that in all cases, to constitute a quorum of the vestry, one warden must be present.

We are therefore of opinion that a majority of the members composing the vestry being present, although no warden was present, a competent quorum was assembled, and they might properly call the meeting of the 7th of September.

This meeting having been thus legally called, they properly proceeded to elect William W. Mair and Edwin H. Sampson as wardens.

Some objection was suggested to the legality of the election of those persons, upon the ground that illegal votes were received. But there is nothing in the case to show that they affected the result, or that a majority of votes were not cast for those persons, without counting such supposed illegal votes.

The wardens thus chosen succeeded to the offices held by Goddard and Parrott, and assuming that these latter persons legally held over, and continued to be the legal wardens until others were chosen in their stead, yet when others were chosen, they ceased to be wardens. Thus the office of warden being filled for the remainder of the parochial year, there was no authority for the meeting holden on the 18th of September, under the warrant from Henry M. Parker, to proceed to the choice of wardens, nor can the plaintiffs have any legal rights, as wardens, under that election. After the 7th of September, the plaintiffs ceased therefore to be legal wardens, and Mair and Sampson succeeded to their offices. After this, the latter were properly regarded as holding such offices, and the defendant might deal

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with them as such, and a payment made to them as wardens of Christ Church would be duly made.

The plaintiffs have therefore failed to maintain their action, and judgment must be entered for the defendant.

JOHN LINTON vs. JOHN SMITH & others.

The owners of a vessel are not liable for damages occasioned by the negligence of stevedores employed for a gross sum by the consignees of the charterers in unloading the cargo.

ACTION OF TORT. Trial in the court of common pleas, before Bishop, J., to whose rulings the defendants alleged exceptions, the substance of which appears in the opinion.

E. D. Sohier, for the defendants.

E. Ripley, for the plaintiff, cited *Hilliard v. Richardson*, 3 Gray, 349; *Martin v. Temperley*, 4 Ad. & El. N. R. 298; *Randelson v. Murray*, 8 Ad. & El. 109; *Burgess v. Gray*, 1 C. B. 578; *Stone v. Codman*, 15 Pick. 297; *Yates v. Brown*, 8 Pick. 22.

THOMAS, J. The defendants were the owners of an English vessel called the *Syphax*. They entered into a charter party to take a cargo from London, and deliver it alongside of the vessel to the owners in the port of Boston. The consignees of the vessel in Boston, with the consent of the master, made a contract with John and Daniel Hurley, stevedores, to discharge the cargo on to the wharf. By this contract, the stevedores were to unload the entire cargo for a certain gross sum, to find all that was necessary therefor, and to make good all damage to the cargo in unloading; the master and crew having nothing to do with it. The business of stevedores is a separate, distinct, well recognized business in Boston, which the Hurleys had followed for many years. While, under this contract, the stevedores were unloading the vessel, the plaintiff's leg was broken through the negligence of the stevedores or the men in their employ.

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The question is, whether the owners of the vessel are liable for that injury? This question, stated in another form, is, whether the relation existing between the owners of the vessel and the stevedores was that of master and servant or contractor and contractee. (The word is a bad one, but there is no substitute.)

The general rule is, that he who does the injury must respond. The well known exception is, that the master shall be responsible for the doings of the servant whom he selects and through whom, in legal contemplation, he acts.

But when the person employed is in the exercise of a distinct and independent employment, and not under the immediate supervision and control of the employer, the relation of master and servant does not exist, and the liability of a master for his servant does not attach.

Such, we think, is the case at bar. The Hurleys were exercising a distinct business, under an entire contract, for a gross sum. The relation is that of contractor and contractee.

The law upon this subject has been so recently considered by us in *Hilliard v. Richardson*, 3 Gray, 349, that we content ourselves with referring to two or three cases quite directly in point.

In the well known case of *Laugher v. Pointer*, 5 B. & C. 547, the owner of a carriage hired of a stable keeper a pair of horses to draw it for a day, the owner of the horses providing a driver, through whose negligent driving an injury was done to the horse of a third person. It was held by Lord Tenterden and Littledale, J. that the owner of the carriage was not liable, Bayley and Holroyd, JJ. dissenting.

The case of *Quarman v. Burnett* arose in the exchequer upon the same state of facts as in *Laugher v. Pointer*. The court of exchequer adopted and affirmed the view of the law before taken by Lord Tenterden and Mr. Justice Littledale, and held that the owner was not liable; a very elaborate opinion being delivered by Mr. Baron Parke. 6 M. & W. 499.

In *Milligan v. Wedge*, 12 Ad. & El. 737, and 4 P. & Dav. 714, the buyer of a bullock at Smithfield Market employed a licensed drover to drive it from Smithfield. The drover employed

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a boy to drive. Mischief was occasioned by the bullock through the careless driving of the boy. It was held by all the judges of the queen's bench that the owner of the bullock was not liable.

There is also a well considered case in Michigan, to the same point. *De Forrest v. Wright*, 2 Mich. 368. A public licensed drayman was employed to haul a quantity of salt from a warehouse and deliver it at the store of the employer, at so much a barrel. While in the act of delivering it, one of the barrels, through the carelessness of the drayman, rolled against and injured a person on the sidewalk. The court held that the employer was not liable for the injury; the drayman exercising a distinct and independent employment, and not being under the immediate control and supervision of the employer.

The case of *Randleson v. Murray*, 8 Ad. & El. 109, and 3 Nev. & P. 239, would seem at first to conflict with the cases before referred to. A warehouseman employed a porter to remove a barrel from his warehouse. The master porter employed his own men and tackle. Through the negligence of the men the tackle failed and the barrel fell and injured the plaintiff. The warehouseman was held liable. The report does not show whether the porter was acting upon a contract to do the job for a specific sum or on wages. The case is put, in the decision, on the relation of master and servant. See remarks of Lord Denman, C. J. and Williams, J., in *Milligan v. Wedge*, 12 Ad. & El. 741, 742, and 4 P. & Dav. 717.

The distinction upon which these cases and many others referred to and examined in *Hilliard v. Richardson* turns is, whether the relation of master and servant exists, or that of contractor and contractee. The line of separation may be sometimes indistinct and shadowy, but in the case before us it is sufficiently clear.

We are of opinion, upon the facts stated, that the owners of the vessel were not liable, and that the exceptions must be sustained.

WILLIAM T. MERRIFIELD vs. SAMUEL ROBBINS & another.

A volume purporting to contain the laws of another state, with the words "By authority" printed on the title page, sufficiently shows that it is printed by authority of the legislature of that state, to warrant its admission in evidence under the Rev. Sts. c. 94, § 59. In an action to recover the price of goods sold by a third person, alleged by the plaintiff to be his agent, letters and invoices of that person, and copies of letters sent to him by the defendants, (the originals of which the plaintiff has had notice to produce,) are admissible against the plaintiff to show with whom his agent contracted.

ACTION OF CONTRACT against Robbins & Lawrence to recover the price of gun barrels sold to the defendants by Smith & Weeks on the plaintiff's account.

At the trial in the court of common pleas, before *Mellen*, C. J., there was evidence tending to show that Smith & Weeks carried on the business of manufacturing gun barrels in a factory leased to them by the plaintiff under an agreement that the business should be carried on in his name, and that he should receive the proceeds of all sales, and, after deducting the amount of the debts of Smith & Weeks to him, and of his liabilities on their account, pay over the balance to them; and in their own name made with the defendants the agreement for the manufacture of the gun barrels for the price of which this action was brought; but the plaintiff, before the delivery of these barrels, notified the defendants of his interest in the business.

The defendants contended that they were not liable; but that, if any one was liable, it was a corporation doing business in Vermont under the name of the Robbins and Lawrence Company; and, in order to prove the act of incorporation, offered a volume purporting to contain the laws of the State of Vermont, upon the title page of which were printed the words "By Authority." The plaintiff objected to the introduction of the volume, because it did not appear that it was published by authority of the legislature of Vermont. But the court overruled the objection.

In order to show that the contract was made with the corporation, the defendants offered in evidence the letters and invoices

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of Smith & Weeks; and also, after giving the plaintiff notice to produce them, copies of letters addressed by the defendants to Smith & Weeks. The plaintiff objected to these papers; but the court admitted them, on the ground that the plaintiff himself claimed to recover on the ground that Smith & Weeks were his agents in the whole business.

The jury found a verdict for the defendants and the plaintiff alleged exceptions.

W. Brigham, for the plaintiff.

H. F. Durant, for the defendants.

MERRICK, J. The volume of laws produced in evidence by the defendants, upon the title page of which were printed the words "By Authority," we think did thereby purport to have been published under the authority of the government of the State of Vermont; because we do not know how else any authority for the publication could have been conferred, or that it was possible to have derived it from any other source. The objection to its admissibility was therefore properly overruled. Rev. Sts. c. 94, § 59.

The plaintiff attempted to maintain his action upon the ground that Smith & Weeks, in the manufacture and sale of the gun barrels, for the price of which it is prosecuted, acted as his agents. Upon the assumption that they were his agents, the bills and invoices prepared by them and sent with the barrels were acts and declarations made within the scope of their agency, and in the transaction of business pertaining to it, and were therefore admissible in evidence. For a like reason, the copies of the letters, being a portion of the correspondence between the parties relative to their contract and in the course of its execution, were properly allowed to be laid before the jury, to be considered as far as they might legitimately bear upon the question in issue concerning the party by whom the purchase had been made. Sufficient proof was first adduced to show, to the satisfaction of the court, that the original letters could not be found by the defendants to be produced upon the trial, and they were therefore rightly permitted to avail themselves of copies as secondary evidence.

Exceptions overruled.

Shepherd v. Young, Administrator.

SARAH SHEPHERD vs. EDWARD YOUNG, Administrator.

A widow who has supported a destitute infant grandchild, cannot, upon the death of the child by a railroad accident, and the payment of damages to its administrator by the proprietors of the railroad, maintain an action against the administrator, for the amount of the child's board, even if he has expressly promised to pay it.

ACTION OF CONTRACT ON AN ACCOUNT ANNEXED OF \$500 for board of Julia Anderson, the defendant's intestate, and her mother, from the 15th of August 1850 to the 4th of July 1852; with a count on a special promise by the defendant to pay said bill to the plaintiff.

The parties submitted the case to the decision of the court upon the following facts, and agreed that the court might draw such inferences therefrom as a jury might draw.

On the 15th of August 1850 said Julia, being then sixteen months old, and her mother, Agnes Anderson, were deserted by Thomas Anderson, their father and husband, without the fault of said Agnes, leaving them entirely destitute; and on the same day went to live with the plaintiff, who was a widow, and mother of Mrs. Anderson, and lived with her till the 4th of July 1852, during which time they were supported by the plaintiff, and Mrs. Anderson did what work she could, when the child did not need her attention, and earned enough to clothe herself and child, and pay her mother about twenty five dollars, and, if it had not been for the child, could have supported herself.

In May 1853 said Julia, being a passenger in the cars of the New York and New Haven Railroad Corporation, was instantly killed by the great accident at Norwalk. On the 18th of August the defendant was duly appointed her administrator, and on the 30th of that month received from the railroad corporation twenty five hundred dollars, and as such administrator executed to them a release of all claims for damages on account of her death, and also, under a power of attorney from Mrs. Anderson which was afterwards ratified by her husband, a release of all her claims. Said Julia had no other estate than this claim for damages.

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Afterwards, and before the defendant had paid over any of the money, the plaintiff filed with him her bill of five hundred dollars for board; and he said, "it was an honest claim, and he would see that she had it, whether the money went to Mr. Anderson or Mrs. Anderson," and about the same time paid Mrs. Anderson two hundred dollars out of the twenty five hundred dollars; and afterwards, and before this suit was brought, represented that he had paid Mr. Anderson fourteen hundred dollars in full discharge of his claims.

F. W. Sawyer, for the plaintiff, cited *Gay v. Ballou*, 4 Wend. 403; *Hallett v. Oakes*, 1 Cush. 296.

I. J. Austin, for the defendant.

BIGELOW, J. The facts in this case do not show any valid debt by the infant's intestate to the plaintiff. The board of the child was clearly a gratuity, furnished from motives of affection and kindness by the plaintiff, without any expectation of remuneration, or intent to make a claim in the nature of a debt. There is therefore nothing on which an implied contract can rest to charge the assets of the intestate in the hands of the defendant. *Osborne v. Governors of Guy's Hospital*, 2 Stra. 728. *Pelly v. Rawlins*, Peake's Add. Cas. 226. *Dearborn v. Brownson*, 3 Met. 155. *McGilvery v. Capen*, 7 Gray, 524, 525.

Nor can the plaintiff maintain her action against the defendant as administrator, to charge assets in his hands on the express promise of the defendant. It was wholly without consideration and void, as *nudum pactum*. Besides, it was not competent for the defendant, by his promise, to bind the assets in his hands as administrator, to pay a claim which was not valid as against the estate of his intestate. *Washburn v. Hall*, 10 Pick. 431. *Ripley v. Sampson*, 10 Pick. 373.

Judgment for the defendant.

SARAH BLAKE & others vs. SILAS SANBORN.

A writ of entry to foreclose a mortgage made to secure a note to two jointly may be prosecuted, after the death of one of the two, by the survivor.

DEWEY, J. This action brought to foreclose a mortgage given to four persons to secure a note payable to them was, as is conceded, properly brought, being in the names of the four mortgagees. But pending the action, one of the mortgagees has died, and the question is whether the suit can be prosecuted by the three survivors. The defendant contends that the action cannot be maintained in the name of the three, because the mortgagees did not hold their estate as joint tenants, but as tenants in common.

In the opinion of the court, for all the purposes of the present question, the parties are to be considered as clothed with the like privileges as joint tenants. The Rev. Sta. c. 59, § 11, in which is found the provision declaring all conveyances of real estate, where the contrary is not clearly expressed, to be tenancies in common, expressly except mortgages. This is perhaps sufficient to settle the present case.

The further provision in the Rev. Sta. c. 93, §§ 12-14, as to the survivorship of actions, providing that in all personal actions the surviving plaintiff may prosecute the action, and in all real actions the heir at law may come in and prosecute the same in connection with the survivor, does not precisely meet the present case—the action not being a personal action, nor a real action where the estate is of that character in which the right vests in the heir at law, but in the administrator whose sole duty it is to foreclose the mortgaged estates held by his intestate.

But in the opinion of the court it is in accordance with the general principles applicable to mortgages to two or more persons to secure a joint debt, that in case of the death of one of the mortgagees, the action may be maintained by the survivors in their names, and it is not necessary that the administrator of the deceased mortgagee become a party to the suit.

The case of *Burnett v. Pratt*, 22 Pick. 556, was not like the present. It was the case of a mortgage given to four persons, to secure four distinct notes, one of which was due and payable to each of the mortgagees as their sole property. Three of the mortgagees had died, and the action to foreclose the mortgage was brought by the survivor; but it appearing that the note payable to him, secured by the mortgage, had been paid, and that he had no interest in the foreclosure, it was held, that the action could not be maintained in his name, when the conditional judgment would be solely to enforce payment of a note payable to a deceased mortgagee. In the case at bar, the note is one held by the mortgagees jointly, each owning one undivided fourth part of it. The surviving mortgagees have an interest in the same, and are seeking to enforce the payment thereof. We think the action may be maintained in their names. If the conditional judgment is discharged by payment, they will of course be answerable over to the administrator of the deceased mortgagee for one fourth of the note; if the mortgage is foreclosed, they will hold the land in trust for all concerned in the mortgage. *Judgment for the plaintiffs.*

J. A. Loring, for the plaintiffs.

G. E. Betton, for the defendant.

CHARLES T. SAVARY *vs.* WILLIAM E. CLEMENTS.

A seaman does not forfeit his wages by leaving a dangerously unseaworthy vessel, which the master has unreasonably neglected to repair.

ACTION OF CONTRACT by a seaman for his wages on board a British schooner, of which the defendant was master. Answer, that the plaintiff, at Yarmouth, in the province of Nova Scotia, signed shipping articles for a certain voyage, and left the vessel before the completion of the voyage. Replication, that the vea-

sel was leaky and thereby rendered unseaworthy, and unable to complete her voyage with probable safety, and that the defendant, though requested by the mate and a majority of the crew, had neglected to make proper repairs upon the schooner.

At the trial in the court of common pleas, the plaintiff offered evidence tending to prove his replication. But *Mellen*, C. J., ruled that it would not support his action. A verdict was taken for the defendant, and the plaintiff alleged exceptions.

A. B. Davis, for the plaintiff.

P. S. Wheelock, for the defendant.

BIGELOW, J. The contract of the seaman with the master or owner of the vessel is, that he will serve during the prescribed term or voyage; if he leaves without cause, his wages are forfeited. Nor does he earn wages, if the vessel be lost by shipwreck during the voyage; because the law aims, in the exercise of a wise policy, to secure the utmost exertions of the mariner to save the vessel from destruction by the perils of the sea. But there are reciprocal obligations, on the part of the owner or master, imposed by the contract. These are implied from the relation of the parties and the nature of the service in which the mariner is employed. He is entitled to proper treatment at the hand of the master, and to be fed with wholesome provisions. Inhuman and brutal conduct, endangering life and limb, or unwholesome food, causing sickness, is a breach of the contract, which will justify the seaman in abandoning the service in which he is engaged, without incurring a forfeiture of his wages. So too, if a vessel be unseaworthy to such a degree as to render her unfit to encounter the ordinary perils of the sea, so that her crew cannot continue the voyage, except at the imminent risk of their lives, it is the duty of the master or owner to repair her, and if he omits to do so, when she is in port and a suitable opportunity is afforded for the purpose, it is a breach of the contract with the seaman, which justifies him in abandoning the service, without forfeiting the wages he has already earned. The whole doctrine is briefly and clearly stated by Lord Kenyon. "Is a man bound to serve at the peril of his life? Desertion is an answer to the seaman's claim for wages; but that

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must be a voluntary act of the seaman's, and not be caused by any act of the captain." *Limland v. Stephens*, 3 Esp. R. 270. *The Castilia*, 1 Hagg. Adm. 59. *Ward v. Ames*, 9 Johns. 138. Such we understand to be the law of England, under which the contract in the present case was made.

The evidence offered by the plaintiff ought to have been submitted to the jury with instructions, that if the vessel, when in port, where she could have been repaired, was unseaworthy, so that she could not continue her voyage without danger to the lives of her crew by reason of such unseaworthiness, of which the master had reasonable notice, and he thereupon refused to make the necessary repairs, the plaintiff was justified in leaving the vessel and was entitled to recover wages for the time he had served on board.

Exceptions sustained.

GEORGE O. CARPENTER vs. JOSEPH HALE.

If chattels are pledged without authority by a person to whom they have been entrusted by the owner for a special purpose, the pledgee, after notice of the true ownership, and a demand by the owner, which he refuses, is liable to a subsequent purchaser of the owner's rights, in trover, after a demand by such purchaser; although he has sold the chattels since the first demand, and before the second.

ACTION OF TORT for the conversion of boot leather. The parties submitted the case to the decision of the court upon the following facts:

This property being owned by Thomas Emerson's sons, boot and shoe manufacturers, and entrusted by them to John O'Sullivan to make up into boots, for hire and reward, was by O'Sullivan pledged and delivered to the defendant as security for money lent. After the defendant had so taken the property, and while he had it in his possession, the Emersons notified him of their ownership and claimed the property; but he desired to keep it, in order to find out the person who had pledged it, who was then unknown to him. The Emersons afterwards sold their

interest in the property to the plaintiff, who informed the defendant thereof, and demanded the property. But the defendant refused to deliver it, and had in fact sold the property, if he legally could, before this demand.

W. L. Brown, for the plaintiff.

M. G. Cobb, for the defendant. 1. The sale by the Emersons to the plaintiff passed no title; the property being in the hands of a third person claiming by adverse right, and neither actually nor constructively in the possession of the vendor, nor capable of delivery by him. 2 Kent Com. (6th ed.) 468.

2. The property had been converted by the defendant, before the alleged sale to the plaintiff, by withholding and refusing possession after the demand by the Emersons. 2 Greenl. Ev. §§ 642, 644. 3 Stark. Ev. (4th Amer. ed.) 1496.

3. The action should have been brought by the Emersons, the persons against whose legal right the tort had been committed. *Holly v. Huggeford*, 8 Pick. 73. *Boynton v. Willard*, 10 Pick. 166.

DEWEY, J. It appears from the facts stated in this case that the Emersons were formerly the owners of the property, the value of which is sought to be recovered in this action, and continued to be so at the time that the same was delivered to the defendant by way of a pledge, by one who had no authority to do so. The property was reclaimed by the Emersons while in the hands of the defendant, and permitted by them, at the defendant's request, to remain in his hands for a special purpose the Emersons having the entire property, and the constructive possession. In this state of facts, a sale by the Emersons to the plaintiff would be valid and effectual to pass the property, and to authorize an action by the plaintiff against the defendant for any conversion of the property after the sale to the plaintiff.

No change having been shown by the case stated as to the character of the possession of the defendant prior to the sale to the plaintiff, and no conversion previously thereto, no necessity exists for considering what would be the effect of an exclusive adverse possession of personal property upon the right of the legal owner to sell and transfer his title to a third person.

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The fact that the goods were sold by the defendant before an actual demand upon the defendant by the plaintiff does not defeat his action, if the property had previously passed to the plaintiff by a sale by the Emersons, they having the property and the constructive possession in the manner before stated.

Judgment for the plaintiff.

DANIEL DESHON vs. EDWARD B. BIGELOW & others.

A sale and delivery of goods upon condition that the title shall not pass until payment of the price give the vendee no title which he can convey to a purchaser in good faith and for a valuable consideration.

REPLEVIN of two cases of cigars. The defendants claimed the cigars as *bona fide* purchasers for a valuable consideration from Tinkham, Adams & Company.

At the trial in the court of common pleas before *Mellen*, C. J., there was evidence tending to show that the cigars were purchased from the plaintiff by Tinkham, Adams & Co. for cash, and were delivered to them upon the condition that the title should not vest in them until payment of the purchase money; that payment was twice demanded and refused, and a few days afterwards Tinkham, Adams & Co. failed, having sold the cigars to the defendants three days before their failure.

The plaintiff, in order to show that the purchase by Tinkham, Adams & Co. was fraudulent, was permitted, against the defendant's objection, to introduce evidence tending to show other frauds committed by them near the same time.

The court instructed the jury that if the sale by the plaintiff was upon the condition that the property should not pass to the vendees until paid for in cash, and the delivery was made upon the same condition, and this condition had not been waived by the plaintiff nor performed by the vendees, the property did not pass to them, and they could not transfer a title even to an innocent purchaser for a valuable consideration

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The jury found a verdict for the plaintiff, and also, in answer to questions submitted by the court, that the sale and delivery were upon condition, and the condition had never been waived nor performed. The defendants alleged exceptions.

W. Brigham, for the defendants.

N. Morse, for the plaintiff.

METCALF, J. The jury have found that the sale by the plaintiff to Tinkham, Adams & Co. was on a condition that the property in the cigars should not pass to them till payment therefor should be made in cash; that the delivery was upon the same condition; and that this condition was not waived by the plaintiff, nor performed by the purchasers. Hence, by settled rules of law, (which have been so recently discussed and applied that it is unnecessary to do more than to refer to three or four decisions,) neither an attaching creditor of the purchasers, nor their vendee, though buying of them in good faith, can hold the property against the plaintiff. *Hill v. Freeman*, 3 Cush. 257. *Coggill v. Hartford & New Haven Railroad*, 3 Gray, 547. *Sargent v. Metcalf*, 5 Gray, 306. *Burbank v. Crooker*, 7 Gray, 158.

The condition, on which the plaintiff's sale was made, being proved to the satisfaction of the jury, the question whether the defendants bought the cigars of Tinkham, Adams & Co. in good faith, or coöperated with them in a fraud on the plaintiff, became immaterial. Good faith would not have saved them, if they had exercised it; for their vendors, having no title to the property, could convey none. The defendants would have been in the same legal condition as are *bona fide* purchasers of stolen goods. We therefore need not inquire whether the evidence, as to fraud, which was objected to, was rightly admitted. If that evidence had been such as might affect the jurors' minds on the other question, viz. whether the sale by the plaintiff was or was not conditional, we should have deemed it our duty to decide on its admissibility. But we cannot see that it could, in any way, affect that question.

Exceptions overruled.

ABBY D. CLAY vs. JEWETT B. BRIGHAM.

Under the *St.* of 1852, c. 312, the objection, that a declaration in slander, which sets forth a general charge in itself imputing a felony, and states the words spoken, is insufficient, by reason of not stating the circumstances necessary to show the sense in which the words were spoken, must be taken by demurrer.

SLANDER. "And the plaintiff says, that the defendant publicly, falsely and maliciously accused the plaintiff of the crime of larceny, by words spoken of the plaintiff substantially as follows: 'The said Abby is dishonest.'

"And the plaintiff further says, that the defendant publicly, falsely and maliciously accused the plaintiff of embezzlement, by words spoken of the plaintiff substantially as follows: 'She,' (meaning the said Abby, who was then a clerk in his employment) 'is dishonest.'"

Trial in the court of common pleas, before *Hoar*, J., who signed a bill of exceptions, in which the declaration was set out, and the residue of which was as follows:

"After the reading of the plaintiff's writ and declaration, the defendant moved the court to rule that the plaintiff's declaration contained no legal cause of action, and that the action could not be maintained. The court refused so to rule; but ruled that the only objection that could be taken to said declaration was upon demurrer, and that no such objection could be taken at this stage of the cause; and that if it appeared by the evidence that the defendant falsely and maliciously spoke the words as alleged, and under such circumstances and in such connection as to convey a charge of larceny, the action could be maintained. The jury returned a verdict for the plaintiff. To the foregoing ruling the defendant excepts."

C. P. Hinds, for the defendant, cited *Carter v. Andrews*, 16 Pick. 1; *Bloss v. Tobey*, 2 Pick. 320; *Snell v. Snow*, 13 Met. 278.

J. C. Park, for the plaintiff.

DEWEY, J. The charges of larceny and embezzlement are both actionable, and a declaration alleging that the defendant

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had falsely and maliciously charged the plaintiff with the commission of them, or either of them, states a good cause of action.

Whether the declaration is in proper form is quite another question. Prior to the new practice act of 1852, *c.* 312, it was sufficient to set forth the cause of action in these general terms: that the defendant had publicly, falsely, and maliciously charged the plaintiff with the crime of larceny. To some extent, a change is introduced by this statute. The general mode of declaring, in an action of slander, is so far modified as to require in addition thereto the statement substantially of the words spoken of the plaintiff; and if necessary to indicate the nature of the charge, the declaration should contain "a concise and clear statement of such things as are necessary to make the words relied on intelligible to the court and jury in the same sense in which they were spoken." See forms annexed to *St.* 1852, *c.* 312.

If the declaration is not in accordance with the provision of this act, § 21 has provided the remedy, by a demurrer. The same section also requires that in such demurrer "the particulars in which the alleged defect consists shall be pointed out." The benefits of this mode of raising questions of formal compliance with the statute are quite obvious, and should require us to restrict the party objecting to that form of presenting the objection.

If the general charge set forth in the declaration is itself one importing a felony, and the only objection is that there is no sufficient compliance with the provisions of the statute in setting out substantially the words spoken, or such clear statement as is necessary to make the words intelligible in the same sense in which they were spoken, the objection must be taken by demurrer, and not on the trial of the issues of fact.

If no demurrer has been filed, then upon such trial, if it is shown by the evidence that the defendant falsely and maliciously spoke the words as alleged in the declaration, and under such circumstances and in such connection as to amount to a charge of larceny or embezzlement, as the case may be, the action may be maintained.

Exceptions overruled.

THOMAS J. DUNBAR vs. MICHAEL MULRY.

In an action to recover the price of spirituous liquors, which is defended upon the ground that they were sold to be resold by the defendant without license, the defendant cannot, even after proving that no licenses were granted at that time in that county by the county commissioners, and that the plaintiff (who lived in an adjacent city in another county) was frequently, about that time, in the defendant's shop, and had dealings with other persons in the same city and business as the defendant, introduce evidence that it was then generally notorious in that city that no licenses were granted in the county, for the purpose of showing the plaintiff's knowledge of that fact.

ACTION OF CONTRACT by the assignee of E. Gunnison & Co. insolvent debtors, to recover the price of spirituous liquors sold by them to the defendant in 1849 and 1850. Trial in the court of common pleas before *Mellen*, C. J., who signed a bill of exceptions, the material part of which is stated in the opinion.

J. W. May, for the defendant, cited 1 Greenl. Ev. §§ 83, 128, 138 note; 2 Greenl. Ev. § 483, and cases cited; *Carter v. Whalley*, 1 B. & Ad. 11; *Bernard v. Torrance*, 5 Gill & Johns. 383; *Holliday v. McDougald*, 20 Wend. 81; *Jones v. Perry*, 2 Esp. R. 482; *Runquist v. Ditchell*, 3 Esp. R. 64; *Abel v. Potts*, 3 Esp. R. 242; *Godfrey v. Macauley*, Peake, 155 note; 1 Parsons on Con. 144 note.

No counsel appeared for the plaintiff.

THOMAS, J. One ground of defence was, that the liquors were sold to the defendant, the vendor knowing they were to be used for an illegal purpose, to wit, to be sold by the defendant in quantities of less than twenty eight gallons, without a license. The defendant resided in Roxbury, the insolvents in Boston.

Evidence was offered that no licenses had been granted in Norfolk since the year 1840. Evidence was also offered tending to show that one of the vendors was frequently at the shop of the defendant in Roxbury during the time covered by the charges, and that the vendors had business with other traders in Roxbury in their line of business.

The defendant then offered to show that at the time of the making of the sales the fact was generally notorious at Roxbury that no licenses for the sale of liquors were granted in

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Norfolk County, and this for the purpose of showing the knowledge of the plaintiff's insolvent of the fact.

This evidence was rejected, and rightly, we think. The commissioners, as the law then was, had, in the several counties, authority to grant licenses or not. *St. 1837, c. 242, § 2.* The provision was, that they should not be required to grant any licenses when, in their opinion, the public good did not require them to be granted.

The fact, with the knowledge of which the plaintiff was to be charged by reason of its general notoriety, was what course had been pursued under this statute by a local tribunal. It may well be doubted whether this is of the class of facts of such general public interest, that a mere knowledge of the fact may be shown by its general notoriety. As matter of public interest, it affected the inhabitants of the county of Norfolk chiefly, if not only. It was not, and in its nature could not be, a usage or custom permanent in its character. Not only might the members composing the tribunal change, but their opinion. The fact that no licenses were granted last year would be no evidence that they might not be granted this or the next.

But if matter of general usage or custom, it was the usage or custom of a particular county, and only to affect persons living within the district.

Exceptions overruled.

JOHN ELLIOT & others vs. WILLIAM A. HAYES & another,
Executors.

A guaranty that the owner of stock in a corporation shall receive dividends thereon of a specified amount for a certain number of years, he paying to the contractor all he receives above that amount, is valid.

METCALF, J. The defendants' testator, by an instrument under seal, "guarantied and assured" the plaintiffs that they should, for ten years, receive yearly dividends of five dollars on each of their shares (to the number of three hundred) of the preferred

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stock in the Cheshire Railroad. No consideration, besides that which the seal imports, was necessary to the validity of this guaranty. Yet it appears that there was a sufficient actual consideration for it in the plaintiffs' engagement to pay the testator all that the yearly dividends might exceed five dollars on a share. Those dividends have fallen short of five dollars; and this action is brought to recover the deficiency. The action is defended on the alleged ground that it is on a mere wager. And if it were on a wager contract, we should not sustain it. But it is not. The contract, not only in words, but also in its plain design and purpose, is a guaranty to the plaintiffs of a certain yearly profit on railroad stock owned by them. And nothing on its face, or in the facts agreed, discloses any illegality or unfairness. We therefore cannot find any reason why the plaintiffs should not recover. In *Kirkby v. Wright*, 2 Myl. & K. 131, a contract, by which the defendant guarantied to the plaintiff that the net profits of his business should amount, for a certain time, to a specified sum, was enforced in chancery; no question being made as to its validity. And in *Newmarket Railway v. Churchwardens &c. of St. Andrew*, 3 El. & Bl. 94, no doubt was intimated as to the validity of an undertaking to secure to a railway company a yearly dividend of three per cent. on its share capital.

If the contract, in the present case, had been put into the form of a policy of insurance, it is certain that it would not have been a wager policy. 3 Kent Com. (6th ed.) 275, 276. 1 Arnould or Ins. 17, 276. Smith on Con. (4th Amer. ed.) 258, 259.

Judgment for the plaintiffs.

H. C. Hutchins, for the plaintiffs.

C. F. Choate, for the defendants, cited *Amory v. Gilman*, 2 Mass. 1; *Babcock v. Thompson*, 3 Pick. 449; *Ball v. Gilbert*, 12 Met. 397; *Doolubdass Pettamberdass v. Ramboll Thackoorseydass*, 7 Moore P. C. 239; 3 Kent Com. (6th ed.) 278; 2 Parsons on Con. 261, 262.

JOHN E. LODGE & others vs. DANIEL L. SPOONER.

In an action brought here on a contract (not a bill of exchange) to pay money in a foreign country, the plaintiff cannot recover the rate of exchange, although there are no tribunals in that country in which he could sue.

ACTION OF CONTRACT to recover for the passage of the defendant, his family and servants, from Boston to Canton.

The declaration alleged that the defendant agreed to pay the plaintiffs, for such passage, the sum of \$1,800; that this sum was payable in Canton; was demanded there, and not paid; and that the defendant owed the plaintiff that sum, with interest and China exchange, making \$2,400.

The defendant admitted the agreement to pay \$1,800, but not in China; and offered to be defaulted for that sum.

The trial was before the chief justice, who reserved for the full court this case:

It was admitted that the defendant, his family and servants, went out to China in the plaintiffs' ship; and the plaintiffs introduced evidence tending to show that they made an oral agreement with the defendant for the passage for the sum of \$1,800, the passage money to be paid by the defendant in China; and that it was there demanded.

It was conceded that there are no regular tribunals in China, in which one foreigner can recover a debt against another.

The plaintiffs offered evidence of the rate of exchange between China and the United States at the time of the agreement. But the judge was of opinion "that, supposing it a contract made here for services, for a given sum, payable in China, and a failure to do so; in a suit brought here, the amount to be recovered is the stipulated sum and interest, computed according to law and usage here, without the addition of China exchange; and therefore that the evidence was immaterial and inadmissible."

The plaintiffs then offered evidence to show that they had given orders to invest the money in China, when paid by the defendant. But it was held inadmissible.

The plaintiffs further offered evidence to prove that the silver dollar in China is of greater value than the American dollar of account. But the judge ruled, "that, there being no evidence that the agreement in question was for the payment of silver dollars, or any other species of coin, but generally for a given number of dollars, this must, in law, be taken to mean dollars of account of the United States, as regulated and fixed by law."

S. Bartlett & S. Bartlett, Jr. for the plaintiffs. This case raises the general question whether an agreement, made here, to furnish funds at a distant port, in the prosecution of a commercial adventure, is to be vindicated, in case of breach, by requiring payment merely of the sum agreed to be furnished and interest, or of the exchange necessary to have raised the sum at the time and place at which it was agreed to be paid; and upon this point there can be no reasonable doubt. *Greene v. Goddard*, 9 Met. 212. It cannot fairly be urged that, upon the facts shown, the defendant did not know that the fund which he agreed to furnish in Canton was to be used there; since that results from the well known course of trade, and is to be inferred precisely as in the case of a bill of exchange; or, at all events, it is a question to be submitted to the jury.

Had the agreement been to furnish one hundred bales of cotton at Canton, the rule of damages would have been clear, namely, what would it have cost the plaintiff to purchase the cotton at the time and place when and where it was to have been furnished him. That this same rule applies, where money instead of merchandise is to be furnished, is demonstrated by reference to the usual class of contracts for thus furnishing money at a distant port, namely, bills of exchange.

A bill of exchange is a simple agreement between the drawer and the payee that a third party who is presumed by law to have the funds of the drawer, and so is his mere agent, shall pay to the payee the prescribed sum at the prescribed place and time. In the case of bills of exchange, anterior to and independent of all customs or statutes, the law merchant vindicates a breach of the contract by damages; and custom or the statutes does nothing more than fix the rate of those damages by

rules supposed to afford an indemnity, or an approximation thereto.

The present contract differs from a bill of exchange only in this, that the defendant agreed to pay the given sum at a distant port himself, instead of giving a written direction, called a bill of exchange, to a third party, his agent, to pay it; and the rights of the parties cannot be affected by this difference.

Even if, applying the principles which would govern bills of exchange, the defendant stands in the attitude of an acceptor of such a bill, it is well settled that if he had previously agreed to accept, he is liable for the exchange. *Bowen v. Stoddard*, 10 Met. 375. Indeed, Pothier holds the acceptor liable for damages under all circumstances; *Russell v. Wiggin*, 2 Story R. 242; and the case of *Napier v. Schneider*, 12 East, 420, is considered by Mr. Smith as doubtful law. Smith's Merc. Law, (5th ed.) 267. Here the agreement to accept or pay was anterior to the period when the debt became due and payable. In fact, the defendant occupies the position of both drawer and drawee, and the plaintiff that of payee, and the claim in this case does not treat the defendant as an acceptor of a bill, but proceeds upon the special agreement made here to pay money in Canton; and in an action upon such an agreement, even when the defendant has accepted bills but not paid them, the exchange is recoverable by the party with whom he made the contract. *Russell v. Wiggin*, 2 Story R. 242.

It is perhaps a sufficient distinction between this case and *Adams v. Cordis*, 8 Pick. 260, and *Martin v. Franklin*, 4 Johns. 125, there relied on, that those were claims for balances of account, which the court distinguished from the case of bills of exchange, by saying that the nonpayment of such balances is not attended "with the disappointment at not finding funds in the country and in the hands to which the party has been directed for them." 8 Pick. 266.

Adams v. Cordis seems also to rest in part upon the election of the forum by the plaintiff. 8 Pick. 265, 267. This plaintiff had no such election; for the case finds that no tribunals exist in China, to which he could resort.

The suggestion in 8 Pick. 265, that up to that period, no authority was to be found in the books for applying the principles which regulate damages in cases of bills of exchange, to any other class of contracts, is answered by the subsequent adjudications, both here and in England, applying the same principles as to damages, where money due or contracted to be paid in one country is sought to be recovered in another, as are applied to bills of exchange. Indeed, the principle is carried farther, and regulates the amount to be recovered, even on a foreign judgment, by the actual rate of exchange at the date of such judgment, between the country where such judgment was recovered and the forum where it is sought to be enforced. *Scott v. Bevan*, 2 B. & Ad. 78. *Delegal v. Naylor*, 7 Bing. 460. *Cooper v. Waldegrave*, 2 Beav. 282. *Grant v. Healy*, 3 Sumner, 523.

The proposition stated in 4 Johns. 125, and approved in 8 Pick. 267, that the courts are not to inquire into the disposition of the debt, after it shall have been recovered in our tribunals, must be limited to balances of account; and is no reason for holding that upon a claim for damages for breach of a contract to deliver property or pay money at a distant port, the plaintiff shall recover nothing but interest.

Alcock v. Hopkins, 6 Cush. 484, contains no discussion of principles, but professedly follows *Adams v. Cordis*. And the plaintiffs respectfully submit that if this case falls within those, they are unsatisfactory and fit to be revised. See also 3 Kent Com. (6th ed.) 117 note; *Cash v. Kennion*, 11 Ves. 314; *Lee v. Wilcocks*, 5 S. & R. 48.

C. A. Welch, for the defendant. No agreement to furnish funds at a distant port in the prosecution of a commercial adventure is alleged, nor was any proof of such offered. The agreement alleged, and attempted to be proved, was simply an agreement made here to pay money in China for certain services to be rendered.

In a suit brought here, on an agreement to pay, for services rendered, \$1,800 in China, it is well settled that nothing more can be recovered than the stipulated sum and interest, without

the addition of the rate of exchange. *Adams v. Cordis*, 8 Pick. 260. *Alcock v. Hopkins*, 6 Cush. 484. *Martin v. Franklin*, 4 Johns. 125. *Scofield v. Day*, 20 Johns. 102.

The only direct decision in favor of the plaintiff is *Smith v. Shaw*, 2 Wash. C. C. 167; which is called in 8 Pick. 266, "a case of very little authority." All the other cases cited by the plaintiff (except the case in 2 Beav. 282, where no exchange was demanded or given) were reported before the case in 6 Cush. 284, and were cited by the counsel in that case; and none of them turned upon this point.

The rule of damages, upon the breach of a contract for the payment of the money, differs from the rule of damages for the breach of any other agreement; and is limited to the legal interest. *Sedgwick on Damages*, (3d ed.) 112, 234. 2 *Parsons on Con.* 489. *Fletcher v. Tayleur*, 17 C. B. 29.

The case of a foreign bill of exchange is an exception, introduced by mercantile custom, and founded upon the fact, that the drawer's contract is an agreement, not to pay money himself, but that the drawee shall accept and pay the bill; that he will indemnify the holder if the drawee does not accept and pay it; and therefore he is bound to pay the rate of exchange, as well as interest. *Milford v. Mayor*, 1 Doug. 54. *Adams v. Cordis*, 8 Pick. 266. So of an indorser; for he is considered a new drawer. *Ballingalls v. Gloster*, 3 East, 481. But the acceptor is never liable to the holder for reëxchange, in a suit on the bill; because by his acceptance he only agrees with the holder to pay him the sum of money stated in the bill. *Napier v. Shneider*, 12 East, 420. *Woolsey v. Crawford*, 2 Campb. 445. *Bowen v. Stoddard*, 10 Met. 378, 379. *Adams v. Cordis*, 8 Pick. 266. *Russell v. Wiggin*, 2 Story R. 213, 241. 3 *Kent Com.* (6th ed.) 116. *Byles on Bills*, 313. The liability of the drawee to the drawer for reëxchange, when he has agreed with the latter to accept his bill and pay the holder, is founded on that agreement, and not on his liability as acceptor. 2 *Story R.* 241. 10 *Met.* 379. *Riggs v. Lindsay*, 7 *Cranch*, 500. The legislature, in fixing the rate of exchange for which drawers and indorsers and acceptors should be charged, have omitted

parties to all simple contracts. *St.* 1825, c. 177. *Rev. Sta.* c. 33, § 2.

The rule of damages in our courts cannot be affected by the want of legal tribunals in China, in which one foreigner can sue another; nor by the plaintiff's having given orders to invest the money in China — which is not proved to have been known to the defendant, and, if known, could not be considered as matter of damage.

The decision was made in June 1857.

THOMAS, J.* This is an action for the breach of a contract to pay money. The plaintiff would recover the money, and damages for its detention. The remedy is sought in our courts. The rule of damages is the rule of the forum where the remedy is sought. In this commonwealth, the rule is too well settled to be disturbed. It is the legal rate of interest. The cases of *Adams v. Cordis*, 8 Pick. 260, and *Alcock v. Hopkins*, 6 Cush. 484, are conclusive upon our judgment. In principle, the case at bar cannot be distinguished.

The cases of bills of exchange stand upon their own ground; the exception from the general rule being nearly as old as the rule itself.

The rule of damages for the detention of money, as settled, is plain, of easy application, uniform and stable. As nearly as any general and fixed rule can, it works justice. If therefore, from general principles of law, and with the aid of the very able discussion of them in the arguments of counsel, the court were seeking to establish the rule for the first time in this commonwealth, it would probably have reached the same result as by adhering to the cases decided.

Judgment for the plaintiffs for \$1,800, with interest.

* BIGELOW, J. did not sit in this case.

Mayhew v. Thayer.

NATHAN MAYHEW vs. NOAH THAYER.

A husband, whose wife has left his house with his express or implied consent, or in consequence of his cruelty and neglect, is bound to pay for necessities furnished to her while so absent, until he goes or sends for her to return.

A person who, at the request of a wife who has justly left her husband's house, employs and pays a physician for necessary medical attendance upon her, may recover from the husband the amount so paid.

In an action against a husband for necessities furnished to his wife while lawfully absent from his house, evidence of harsh language used to the wife's son in her presence by the defendant is admissible for the purpose of showing harsh and cruel treatment of the wife by him.

In an action against a husband for necessities furnished to his wife while lawfully absent from his house, a son of the defendant, called as a witness by him, may be asked, on cross-examination, in order to impeach his testimony and show his interest, what was the consideration of a conveyance made to him by his father, and whether it was not fraudulent; and also if his father lived with him, and paid board to him.

ACTION OF CONTRACT for necessities furnished to the defendant's wife, including cash paid to a physician for attendance upon her, while she was boarding at the plaintiff's house.

At the trial in the court of common pleas, before *Mellen*, C. J., the plaintiff introduced evidence tending to prove that the wife of the defendant left his house with his consent, and on a visit to her relatives, and was there taken sick, so as to be unable to return; that the defendant, before she left him, treated her with neglect and cruelty, so as to endanger her health, though not with personal violence; and, after he knew of her sickness, did not go or send for her, but refused to let her return, and for six months after she left him paid her expenses; that the articles furnished were necessary and suitable for her support; and that the plaintiff, at her request, asked a physician to visit her while at his house, and afterwards paid him for his visits the amount claimed; but he offered no evidence of authority from the defendant himself to employ the physician or to pay his bill.

The court instructed the jury, "that if they were satisfied that the defendant's wife left his house with his express or implied consent, he was bound to go or send for her to return; and if she remained away with his consent, the defendant was

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liable for necessities furnished to her; that if she wantonly left his house, without having received cruel treatment from him, he was not bound to go or send for her to return; but if she left him by reason of ill treatment, he was bound to go for her or send for her, and if he did not, a stranger might recover for necessities furnished for her."

The defendant contended that the plaintiff was not entitled to recover the amount of the physician's bill, or any part of it, even if it was necessary; but that the physician alone could maintain an action therefor. But the judge ruled, that if the defendant's wife was at the plaintiff's house under such circumstances that he was entitled to recover for necessities furnished to her, and if she was so sick as to need medical attendance, and the plaintiff, at her request, furnished it to her, and paid for it, he could recover the amount so paid in this action.

The plaintiff was permitted, against the defendant's objection, to introduce evidence that the defendant had, in his wife's presence, with harsh language ordered out of the house a son of hers by a former husband; and also of the manner in which it was done.

The plaintiff was also permitted, against the defendant's objection, in cross-examining a son of the defendant offered as a witness by him, in order to impeach his testimony and show his interest, to inquire about the consideration of a conveyance made to him by his father; whether it was fraudulent or not; at whose suggestion it was made; how he paid for it; who kept the house where the defendant lived; and if the defendant paid board to the witness.

The jury found a verdict for the plaintiff, and the defendant alleged exceptions.

L. Shaw, Jr. for the defendant. 1. The judge erred in instructing the jury, that if the defendant's wife left his house with his express or implied consent, he was bound to go or send for her to return; and that if she remained away with his consent, the defendant was liable for necessities furnished to her. The husband's mere passive consent to the absence of his wife from his house is not enough to render him liable for her main-

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tenance elsewhere. The rule of law is, that a husband is bound to provide his wife with necessaries in his own family; and is not bound to furnish her with them, if she does not choose to live in his family, unless he is personally abusive of her, or is guilty of such cruelty to her that she has reasonable apprehension of farther personal violence. *M' Outchen v. M' Gahay*, 11 Johns. 311. *M' Gahay v. Williams*, 12 Johns. 293. *Houlston v. Smyth*, 3 Bing. 127. *Reed v. Moore*, 5 Car. & P. 200. *Atkins v. Curwood*, 7 Car. & P. 756. 2 Bright on Husband & Wife, 10-13.

2. Even if the physician's services were rendered under circumstances which would make the defendant liable to pay for them, he would be liable to the physician alone, and an action therefor must be brought in the physician's name.

3. Harsh language addressed to a son of the defendant's wife, if proved, has no tendency to render the defendant liable to pay for the articles furnished to his wife by the plaintiff.

4. The questions permitted to be put in cross-examination of the defendant's son, in whatever way they might be answered, did not tend to impeach the character of the witness for truth and veracity, or to show that he had a pecuniary interest in this suit.

J. A. Bolles, for the plaintiff.

MERRICK, J. 1. It is insisted for the defendant that the presiding judge erred in instructing the jury that if they were satisfied that Mrs. Thayer left her husband's house with his express or implied consent, he was bound to go or send for her to return; and that if she remained away with his consent, he was liable to pay the plaintiff for necessaries furnished to her for her support. So far as these instructions relate to the supposed or real duty of the defendant to go or send for his wife, they were evidently induced by the facts developed upon the trial, and especially those in relation to the causes which prevailed upon the defendant's wife to leave his house, and the circumstances under which she left it.

But this is really unimportant, since in the sentence next following the remarks of the presiding judge upon this subject,

the extent of the liability of the defendant was carefully and accurately defined, and just limitations were prescribed as to the right of the plaintiff to recover. He could recover for necessities furnished for the support of the wife, if, at the time they were supplied, she was absent from her husband's house with his consent. This is consonant to the rule laid down in all the authorities. Thus it is said by Chancellor Kent: "If the husband abandons his wife, or they separate by consent, without any provision for her maintenance, or if he sends her away, he is liable for her necessities; and he sends credit with her to that extent." 2 Kent Com. (6th ed.) 146. "In like manner, if the husband and wife mutually consent to live apart, she has a right to bind him, by contracting for her reasonable and necessary expenses, as long as the consent continues." Smith on Con. 289. If they separate by consent, the husband is liable for reasonable maintenance of his wife until his consent is revoked, unless she has a competent provision from him, or from some fund of her own; and the burden of proof is on him, if he would exonerate himself from liability, to show that she has such fund. *Emmett v. Norton*, 8 Car. & P. 506. *Dixon v. Hurrell*, 8 Car. & P. 717. *Rumney v. Keyes*, 7 N. H. 571. The principle thus asserted does not appear to be anywhere denied. It is recognized in several of the authorities referred to by the defendant, particularly in the cases of *Houliston v. Smyth*, 3 Bing. 127, and *Atkins v. Curwood*, 7 Car. & P. 756; and as the instructions given to the jury were in conformity to it, they afford the defendant no just ground of exception.

2. The objection that, for the expense incurred in procuring the attendance and services of the physician, no action can be maintained by the plaintiff, is founded upon a misapprehension of fact in relation to the person with whom the contract was made. Undoubtedly, if the physician had been employed by the wife on her husband's credit, they would be the only persons who could properly be made parties to an action, the object of which was the recovery of compensation for services rendered. But that was not the contract. The jury have found, under the accurate rule prescribed for their guidance, that the plaintiff, at the

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request of Mrs. Thayer, procured and furnished, at his own cost and charge, the medical advice and assistance which her situation required. If the physician's bill had not been voluntarily paid, it might have been recovered by him. But it was paid by the plaintiff, and the payment gave him a right to call on the defendant for a similar amount, as an item of expense necessarily incurred in the maintenance of his wife.

3. In another branch of the case, and for the purpose of showing that she was justified in leaving his house on account of his gross misconduct towards her, which, under the issue to be tried, was properly made one of the subjects of inquiry, the plaintiff was permitted to give evidence of the manner in which, in her presence, the defendant ordered his wife's son out of the house, and of the harsh language then used towards him. As one of a series of acts of vexation and annoyance, perpetually occurring, by which her residence with him was made at first uncomfortable and at last insupportable, the conduct of the defendant on this occasion was a fit matter to be laid before the jury, as having some tendency to establish the fact of gross ill treatment, which the plaintiff was attempting, and had a right, to prove in the case. Of itself, it may be thought to be of very little importance; but the jury would judge of the weight to be attached to it; while the court had only to determine whether it was proper to be considered at all.

4. Objection is taken by the defendant to the cross-examination of one of his witnesses, which was allowed by the court. Considering the relation in which the witness stood to the party, that there was a family difficulty, and that it is perfectly natural, and in accordance with all experience, that testimony given under such circumstances is liable to be affected by a prevailing bias, or by some inveterate prejudice, of the force of which the witness may not himself be fully sensible, we cannot say that the presiding judge erred in suffering the inquiry to take too broad a range. There are no positive and fixed limits to a cross-examination. Matters wholly irrelevant are of course to be excluded; but, subject to that rule, much must be left to the judgment and discretion of the court under whose supervision

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the trial takes place. The conveyance of property from the defendant to his son, the circumstances under which it took place, the influence it would be likely to produce upon his mind, and the general relations subsisting between them, might properly, when considered in reference to the whole testimony of the witness, and his own appearance and demeanor while giving it, have some effect upon the degree of credibility which ought to be awarded to him. Under such circumstances, we do not perceive that the discretionary authority of the court, in fixing the limits of a cross-examination, was here exercised injudiciously; or that the interrogatories proposed to the witness were allowed to extend so far as to afford any just or legal ground of objection to the manner or course of the trial.

Exceptions overruled.

FRANCIS MCKAVLIN vs. ANN BRESSLIN.

Before the St. of 1855, c. 304, the earnings of the personal labor of a wife, even when living apart from her husband, were his property, and might be recovered by him from one to whom she had assigned them without value.

The books of a savings bank are admissible in evidence, in an action by a husband to recover money deposited in the bank by his wife, and at her order transferred to the credit of the defendant, to prove such deposit and transfer.

ACTION OF CONTRACT for money had and received. Writ dated January 15th 1855.

At the trial in the court of common pleas before *Mellen*, C. J., the plaintiff introduced evidence tending to show that Belle McKavlin was his wife, but had, for a year and a half, lived separate from him. He then offered as a witness Charles Barry, clerk of a savings bank in Boston, with the books of the bank. Barry testified that the entries on the books were not made by him, and the defendant therefore objected to their admission; but the court admitted them on the ground that the entries were made against the interest of the bank.

It appeared from the books that Belle McKavlin deposited

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\$500 in the Savings Bank in August 1854; and that in December 1854 this sum was, on her order, transferred to the defendant, and had been demanded by the defendant of the bank. There was no evidence of any value given by the defendant to said Belle for the deposit until after this suit was brought.

The defendant offered evidence tending to show that Belle McKavlin earned the money so deposited by her own labor, partly while living with her husband, and partly since their separation.

The judge instructed the jury that if the plaintiff had proved that Belle was his wife, and that the money was deposited by her and transferred to the defendant, and that the money so deposited was the property of the plaintiff, the verdict must be for the plaintiff; and that it made no difference whether it was earned by her labor or not, or while living with or separate from her husband. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

N. St. J. Green, for the defendant.

L. Gray, for the plaintiff.

MERRICK, J. The question of the legal admissibility of the books of the Savings Bank in evidence can hardly arise between the parties to the suit, upon the statement of facts reported in the bill of exceptions; certainly it is unnecessary that it should be raised, in order to determine the points in controversy between them. From the testimony of Barry, the competency of which is undisputed, it appears that in fact the sum of five hundred dollars which stood credited on those books to the plaintiff's wife were on her order transferred by the witness, as a clerk and authorized officer of the institution, to the defendant; who afterwards demanded the money of the bank and received it as her own. This would be sufficient to trace the money, to which the plaintiff was entitled while it stood credited to his wife on the books of the bank, into her hands.

But as to the question whether the books were not competent evidence to show each of the two deposits, and to whom the money deposited belonged, we do not see how this case can be distinguished from that of the *Union Bank v. Knapp*, 3 Pick.

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96, in which it was said by Putnam, J., in giving the opinion of the court, that "there is a peculiar reason why the books of the bank should be given in evidence; for the bank furnishes transcripts of them to its depositors; which in effect operate as the mutual acknowledgment of the parties as to their money dealings. And we are of opinion that the books are to be open for the several depositors, and that the bank is bound to produce them on all proper occasions. The officers of the bank having charge of the books are to be so far considered as agents for both parties." 3 Pick. 108.

It has been suggested that the defendant took nothing by the credit given to her on the books of the bank, because Belle McKavlin, being the wife of the plaintiff, had no right or authority to transfer the money credited to her. This is true; but the act of transfer is in effect ratified by the plaintiff by the claim which he makes upon the defendant for the money, and by the prosecution of this suit against him for its recovery. To the general proposition that the money was transferred in fact as stated by Barry, from the plaintiff's wife to the defendant, all the parties, including the bank, agree. The defendant in this way has come into possession of the money; but the plaintiff refuses to ratify the transfer of the property in the money to the defendant; and therefore, having shown it to be his own, he has a right to reclaim it. This was the precise instruction given to the jury; and their verdict for the plaintiff must have been upon their finding that the plaintiff had proved that Belle McKavlin was his wife, that she deposited in the bank the same five hundred dollars which was afterwards transferred to the defendant, and that the money so deposited was his own.

As the wife had no authority to act for her husband, no receipt or discharge which she could give to the defendant could be made available in her defence against the claim of the plaintiff, the evidence offered by her upon that subject was inadmissible and was of course properly rejected. *Exceptions overruled.*

Goddard & another v. Winthrop & another & trustees.

DAVID GODDARD & another vs. THOMAS C. WINTHROP &
another & Trustees.

An assignment and delivery by a citizen of New York to a citizen of Massachusetts in New York of property there, to be sold by the assignee and applied *pro rata* to the payment of certain acceptances of the assignor held by citizens of Massachusetts and Rhode Island, are valid, and the assignee will hold the proceeds of the sale against a creditor attaching them in his hands in this state.

THOMAS, J. This is an action against Fenner as the drawer Winthrop as the acceptor of a bill of exchange, and Chace, Wheelwright & Company as trustees. The question is whether, upon the facts agreed, the trustees should be charged.

Winthrop, a citizen of New York, on the 23d of March 1855 delivered in New York to the trustees, citizens of Massachusetts, but then in New York, fifty two bales of sheetings, to be sold by them and applied *pro rata* on certain acceptances of Winthrop to the amount of \$5,800, held by other persons, citizens of Rhode Island and Massachusetts, taking from the trustees the following agreement:

"In consideration of the receipt of fifty two bales of sheetings from Thomas C. Winthrop, containing fifty three thousand seven hundred and forty yards, we hereby covenant and agree to apply the net proceeds of the sale of said goods (which net proceeds shall not be less than four cents and one eighth of a cent per yard) to the payment of his acceptances of C. G. Fenner's drafts *pro rata* on all said acceptances that have become due and shall become due since the first of February last to the first day of July next, amounting to fifty eight hundred and fifty five dollars and fifty three cents, said payments to be made within three months from the date hereof, and said payments to be indorsed on said acceptances, and receipts for the same to be given to said Winthrop for the parties who hold or may hold said acceptances. In witness whereof we have hereunto subscribed our hands and affixed our seals this twenty-third day of March 1855

Chace, Wheelwright & Co. [Seal.]"

The goods were sold in New York by the trustees for \$2,218.68 net. The holders of the drafts, to an amount of \$3,000, assented to the agreement before the service of the writ. In a supplementary answer, the trustees say they have been informed and believe that all the holders of acceptances, except the plaintiffs, were informed of the provision made for them in the agreement, and expressed their assent thereto before the service of the writ; and they have personal knowledge that such assent has been given since the service of the writ.

The facts then show a delivery to the trustees of certain specific property, to pay certain specified debts *pro rata*. There was no general assignment, no preference of one class of creditors over another, no provision for any discharge of the debtor, nor any evidence of his insolvency.

The agreement was made in New York, the debtor was a citizen of New York, the goods were delivered in New York, and sold there. The agreement was valid by the laws of New York. It is not in conflict with any law of this commonwealth. The trustees, taking these goods and selling them, became liable to pay over the proceeds of the sale under their agreement.

In *Zipcey v. Thompson*, 1 Gray, 243, the assignment was of property in Massachusetts as well as New York, with a preference of creditors in conflict with the provisions of the St. of 1836, c. 238, § 11. In *Bowles v. Graves*, 4 Gray, 117, the agreement was entered into and to be executed in Massachusetts. It was for the benefit of such creditors as should elect to come into the arrangement and discharge their debts. It came therefore within the principle settled in *Wyles v. Beals*, 1 Gray, 233, and *Edwards v. Mitchell*, 1 Gray, 239. *Trustees discharged.*

O. G. Peabody, for the plaintiffs, cited *Wyles v. Beals*, 1 Gray, 233; *Edwards v. Mitchell*, 1 Gray, 239; *Zipcey v. Thompson*, 1 Gray, 243; *Russell v. Woodward*, 10 Pick. 408.

F. A. Brooks, for the trustees, cited St. 1856, c. 163; Story Confli. § 423; *Curtis v. Norris*, 8 Pick. 280; *Wales v. Alden*, 22 Pick. 245; *Dwight v. Bank of Michigan*, 10 Met. 58; *Grover v. Wakeman*, 11 Wend. 187; *Cunningham v. Freeborn*, 11 Wend. 248; *Burrill on Assignments*, 309.

Swain v. Mizner.

OTIS SWAIN vs. THOMAS L. MIZNER.

Where a building is leased in distinct portions to several tenants, who have exclusive occupation and control of their respective tenements, and use in common the entry and stairway, an officer who has entered through the outer door of the house into the entry has no right to break open the door of one of the rooms of a tenant who occupies all the rooms on both sides of the entry on the third floor of the house, in order to attach the property of a third person therein.

ACTION OF TORT for breaking and entering the plaintiff's dwelling-house. At the trial in the superior court of Suffolk there was evidence of these facts:

The plaintiff hired and occupied several rooms on each side of the hall or entry on the third floor of a building in Clifford Place in Boston, being all the rooms on that floor. The residue of the building was also leased by the owner in distinct portions to different families. The plaintiff and other tenants each had exclusive occupation and control of the part of the house occupied by him, except of the stairway and entry, which were for the common use of all the tenants of the house.

The defendant was a constable of Boston, and with a writ in his hands as such against one Ramsdell, for the purpose of attaching his goods, went through the entry and up to the door of the plaintiff's room in which the goods were, and, there finding the door fastened, informed the plaintiff that he was an officer, and showing his process, demanded of the plaintiff to open the door, which he refused to do. The defendant then violently, and against the plaintiff's wish, broke open the door and attached the goods.

Nelson, C. J. instructed the jury "that if the plaintiff had proved to their reasonable satisfaction that he had the rightful and exclusive control and possession of a portion of the house, and had also forbidden and endeavored to prevent the entrance of the defendant, then the defendant would have no right violently to break and enter against the plaintiff's will, although he was an officer and had legal process which he was endeavoring to serve, and although he had, without the knowledge of the

plaintiff, and without breaking, got an entrance into the outer door of this common house and building."

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

J. F. Clarke, for the defendant, cited *Lee v. Gansel*, Cowp. 1; *Ilseley v. Nichols*, 12 Pick. 270.

W. W. Winthrop, for the plaintiff, cited *Oystead v. Shed*, 13 Mass. 520; *Ilseley v. Nichols*, 12 Pick. 270; Crocker on Sheriffs, § 318; Sewell on Sheriffs, 110; Gwynne on Sheriffs, 103; *Stedman v. Crane*, 11 Met. 295; *The King v. Trapshaw*, 1 Leach, (4th ed.) 427; *The King v. Rogers*, 1 Leach, 89; *The King v. Carrell*, 1 Leach, 237; 1 Hale P. C. 557; 1 Russell on Crimes, (7th Amer. ed.) 817 & seq.; 4 Bl. Com. 225; 3 Inst. 65; *Tracy v. Talbot*, 6 Mod. 214, and 3 Salk. 260; *Lee v. Gansel*, Cowp. 1; Colby's Pract. 127.

The decision was made at March term 1858.

MERRICK, J. That an officer cannot break the outer door of a dwelling-house to make an attachment of the owner's goods, or to arrest the person of the debtor, or to execute civil process generally, is a doctrine as well established as any in the books; and has been distinctly recognized as the law of this commonwealth. *Semayne v. Gresham*, Yelv. (Amer. ed.) 29 & note (1). *Oystead v. Shed*, 13 Mass. 520. *Ilseley v. Nichols*, 12 Pick. 270. This is not controverted by the defendant; nor does he place his defence upon anything in opposition to this principle; but solely upon a denial of the fact that the door, which was broken by him in order to make the attachment which constitutes the grievance complained of, was the outer door of the plaintiff's dwelling-house.

But upon the facts disclosed in the bill of exceptions, we think that the portion of the building occupied by the plaintiff, distinct from the hall, entry and stairway leading to it, did constitute what must be considered in law his dwelling-house. The whole structure appears never to have been designed as a tenement for a single family, but was so constructed as to afford separate and distinct habitations for several persons. Thus the plaintiff occupied all the rooms on one floor of the building, and the hall or

entry through which he passed to reach either of the doors opening into any of the apartments occupied by him was used as a common passage way for all the tenants of the several portions of it. It would seem to make no difference whatever may be the character or peculiarity of the common passage by which access to a dwelling-house is attained; whether it is a public or a private way; or whether it leads from one street to another, or only into a place or court to which there is but a single entrance; or whether it is an open street, or a way inclosed by buildings and covered with a roof. In the present instance, the hall, entry and stairway served as a common and public passage way for many occupants of entirely distinct habitations. All the right, to which the plaintiff or any other of the tenants of the different parts of the building in this common passage way was entitled, was the right of using it for that purpose in the enjoyment of the tenements which they severally possessed.

The apartments occupied by the plaintiff constituted, in and of themselves, a complete habitation for himself and his family. He had the sole and exclusive use and possession of them, as completely as if they stood separate and apart from everything else, and were in any other distinct structure. The privilege which the law allows to a man's habitation clearly ought to attach to apartments so situated. It arises from the great regard which the law has for every man's safety and quiet; and therefore it protects him from those inconveniences which must necessarily attend an unlimited power in the sheriff and his officers in this respect. *Bac. Ab. Sheriff, N. 3.* And this reason shows that the principle of law which gives protection to dwelling-houses has no reference whatever to their quality, construction or magnitude, but is solely for the purpose of ensuring the quiet convenience and security of those who inhabit and dwell in them. Domestic security and peace would be equally disturbed by violence in breaking the doors and forcing an entrance into a dwelling-house, whether it should consist of the entire portions of a building, or of separate and distinct apartments within it.

Nor can the fact that there were several doors leading from

the common passage way into the different apartments occupied by the plaintiff lead to a different conclusion. For although it was said by Lord Mansfield in *Lee v. Gansel*, Cowp. 1, that the having of four outer doors would lead to the grossest absurdity, since the greatest house in London has but one, that is not the manner in which, according to our prevailing habits and modes of living, our dwelling-houses are here constructed. Many might undoubtedly be found here having four, and it would perhaps be difficult to find a house of any moderate degree of pretension which has less than two outer doors. While all the doors opening into any of the apartments occupied by the plaintiff are closed, each of them may be considered, and must be treated, as an outer door. They are all necessary to protect the habitation from the intrusion of those who have no license to enter it. Whether an officer, who had lawfully passed through one of them, might afterwards, for the purpose of completing the service of his process, treat the others as inner doors, need not now be considered, because no such question arises upon the facts reported. The complaint against the defendant is confined to the breaking open of one of the doors, before he had obtained an entrance into any part of that portion of the building which was in exclusive occupation of the plaintiff.

The defendant contends that the door constructed and used for closing the entrance from the street or public highway into the common hall or entry of the building is to be considered the only outer door of the plaintiff's dwelling-house; that is to say that his house consisted of the apartments occupied by him and of the hall and entry used by him as a passage way in common with the tenants of all the other parts of the building. But this latter fact is by no means shown. On the contrary, these appear to have constituted no part of his tenement. He had an easement in them only, in common with others, who all equally enjoyed the like privilege for the purpose of gaining access to their respective tenements.

Reliance is placed with much confidence by the defendant on the case of *Lee v. Gansel*, above cited, as a decisive authority against the position of the plaintiff, that the apartments in the

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building in which the alleged trespass was committed, constituted his dwelling-house. But the facts in the two cases are quite dissimilar, and therefore the same conclusion is not necessarily to be deduced from each of them. From the statement of facts in the former case it appears that Gen. Gansel was a mere lodger in hired apartments in the house of Mayo, who was at the same time dwelling in it; that the apartments thus hired were in no way connected together, but were upon different floors; and that he had only a right in the kitchen, which clearly imports that he had no exclusive possession of the premises of which, to a certain extent, he had the use and enjoyment. But this plaintiff was a housekeeper and not a lodger only. He was tenant of the apartments which he occupied; they were all on the same floor, and substantially connected together as a single tenement; he had the sole and exclusive possession of them; and in conducting and maintaining his domestic establishment he had no connection with or dependence upon the owner or the occupant of any other part of the building in which he resided. His tenancy resembles that of the occupants of chambers in the inns or court, and in colleges, opening upon a common staircase, which are conceded to be the dwelling-houses of those who live in them. But further than this, it is distinctly stated by Lord Mansfield, that if that which was one house originally comes to be divided into separate tenements, and there is a distinct outer door to each tenement, they will be separate houses.

But without enlarging upon these considerations or seeking for any peculiar principles upon which the plaintiff's action may be maintained, we think it is clear that upon the precise facts stated in the bill of exceptions the apartments in the building, embracing all the rooms on one of its floors, which were hired by the plaintiff and occupied by him with his family as a separate and distinct tenement, constituted, while he was in such possession and use of them, his dwelling-house; and that it was therefore entitled to the privilege and protection which the law affords to the habitations of men.

Exceptions overruled

PRLEG B. CLARK vs. WARNER E. HALE.

A second mortgagee of personal property, by consenting to a sale thereof by the mortgagor discharged of his mortgage, does not warrant the purchaser's title, or estop himself to set up against him a title under a subsequent assignment of the first mortgage.

ACTION OF TORT for the conversion of a hack. The answer denied the plaintiff's title and the conversion.

At the trial in the superior court of Suffolk, before *Abbott, J.*, the plaintiff gave in evidence a mortgage of the hack and other property, made in May 1853 by Bricket, Faxon & Munroe to Mathes & Snow, and by them assigned to the plaintiff in August 1854; and a second mortgage of the same property from the same mortgagors to the plaintiff in July 1853, subject to the first mortgage. It was admitted that the amount due on each mortgage exceeded the value of the hack, and there was evidence tending to prove a conversion by the defendant.

The defendant introduced evidence tending to show that after the execution of both mortgages the plaintiff authorized the mortgagors to sell any of the mortgaged property, and they made several sales under this authority, and in March 1854 sold the hack to one Cheney, and that the plaintiff afterwards authorized and directed Cheney to "trade off or sell" the hack, and Cheney, in July 1854, pursuant to this authority, exchanged it with the defendant for its full value, without giving the defendant notice of the existence of either of the mortgages.

The defendant asked the court to instruct the jury, that if the plaintiff authorized and directed Cheney to trade off or sell the hack, and Cheney, having it in his possession, did, under this authority, exchange it with the defendant in good faith for its fair value, without giving the defendant notice of the existence of either mortgage, the plaintiff would be estopped to set up against the defendant a title in himself under either mortgage.

But the court instructed the jury, that if they were satisfied that the plaintiff, after the execution and delivery of the second mortgage to him, authorized the mortgagors and Cheney to sell

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the hack discharged of that mortgage, and that Cheney sold it under that authority; yet if a valid mortgage of the hack to Mathes & Snow was then in existence, and was afterwards assigned to the plaintiff, the plaintiff, after a demand and refusal, could claim and hold the property under that mortgage, and recover its value in this action to the extent of the debt due under that mortgage. The jury found a verdict for the plaintiff, and the defendant alleged exceptions.

I W. Richardson, for the defendant. In all cases of the sale of a chattel, of which the vendor is in possession at the time of the sale, there is an implied warranty of title. 2 Kent Com. (6th ed.) 478, 479. 1 Greenl. Ev. § 398. *Defreeze v. Trumper*, 1 Johns. 274. *Dresser v. Ainsworth*, 9 Barb. 619. *Huntingdon v. Hall*, 36 Maine, 501. But however this may be, here was not only a sale for full value, but the concealment of an important fact from the purchaser, which obliges the vendor to make the title good to the purchaser. Chit. Con. (8th Amer. ed.) 353. *Peto v. Blades*, 5 Taunt. 657. *Jones v. Bowden*, 4 Taunt. 847. *Emerson v. Brigham*, 10 Mass. 197, and authorities cited. The plaintiff, having authorized the sale to the defendant, without giving him notice of the mortgage which the plaintiff knew to exist, is estopped to claim title against him; and the plaintiff's subsequent purchase of the first mortgage enures to the defendant's benefit.

F. Hilliard, for the plaintiff.

THOMAS, J. This case lies within a narrow compass. The words and acts of the plaintiff, viewed in the light of his position as mortgagee, cannot be construed to be a warranty of title. They were but a waiver and release of his right and interest under the mortgage which he then held. Such waiver and release could not preclude the acquisition of a new title, nor could they work an estoppel, by force of which the interest newly acquired would enure to the defendant.

We need but the aid of this suggestion to see that the instructions of the presiding judge, and his refusal to instruct, were correct in principle, and well adapted to the facts before him.

Exceptions overruled.

HENRY N. GARDNER *vs.* JOHN M. WAY.

The introduction of the plaintiff's book of original entries and ledger, with his suppletory oath, in support of an action for goods sold and delivered, does not authorize the defendant to prove that the plaintiff, some years ago, made dishonest charges in other books of original entry against other parties whose accounts appeared in the same ledger.

A certificate of discharge, obtained upon second proceedings in insolvency, is no bar to an action upon a debt which might have been proved under the first proceedings, and was not proved under the second proceedings; unless it was discharged under the first proceedings, and renewed by a subsequent promise.

ACTION OF CONTRACT for goods sold and delivered. Trial and verdict for the plaintiff in the superior court of Suffolk, at January term 1856, before *Abbott, J.*, who signed this bill of exceptions :

"The plaintiff offered in support of his case his book of original entries, and the ledger in which said entries had been transferred, with his suppletory oath.

"The defendant offered to prove that, in a controversy which arose six years ago between the plaintiff and certain persons whose accounts appeared in the same ledger, and in which controversy said ledger was offered in evidence by the plaintiff with his suppletory oath, that at that time, and on the examination of that case before an auditor (which auditor was now offered as a witness, and his report as testimony) the plaintiff admitted that for several months previous to said charges then in controversy, he had kept two books of original entries, each containing the same dates and items of charge, but with different amounts. But this was some years before the time covered by the book of original entries introduced in this cause.

"The defendant contended that as the character of the plaintiff's books was put into the case now at bar by the plaintiff, the above testimony was competent to invalidate their character.

"But the presiding judge refused to admit the testimony, ruling that the testimony proposed, relating to a time some years previous to the time when the first charge was made on the book of original entries here introduced, had no legal tendency to prove that the plaintiff kept two books of original

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entries during the time covered by the charges in the book of original entries offered in evidence in the case."

J. C. Park & B. F. Butler, for the defendant. At the time of the trial, the plaintiff could not have been a witness in chief, as he could now; but could only make suppletory oath to his books. The ledger was in the case. *Prince v. Swett*, 2 Mass. 569. There might be many consecutive books to one ledger. It was a part of the same set of books, that the testimony offered tended to impeach. Any act of the party, relevant to the question on trial, is admissible in evidence against him; and any state of things or habit once shown is presumed to continue. Whether books are competent evidence is for the court; but their credibility is a question to be submitted to the jury, and a very important one. *Vosburgh v. Thayer*, 12 Johns. 462. *Cogswell v. Dolliver*, 2 Mass. 221. *Prince v. Smith*, 4 Mass. 457. *Plym. Col. Law of 1682*, (ed. of 1836,) p. 196.

H. F. Durant, for the plaintiff.

MERRICK, J. The evidence offered by the defendant on the trial, which was rejected by the presiding judge, was clearly inadmissible. No reference has been made to any authority having any tendency to show its competency. It had relation exclusively to a period of time and to a series of transactions remote and different from those which were the subject of investigation and controversy in the present suit. The books produced in evidence by the plaintiff were open and exposed to any scrutiny to which the adverse party might think fit to subject them; but this gave him no right, for the purpose of disparaging the proof thus adduced, to show that in other books kept by the plaintiff charges against other parties had been unfairly or dishonestly entered. Certainly no greater latitude is to be allowed in the introduction of evidence concerning independent and collateral facts, in order to weaken or invalidate the force of evidence derived from a book of original entries, than would be permitted in reference to the testimony of the party by whom the entries were made, if he were himself a witness upon the trial. And nothing is more clear than that the character of a witness for truth and veracity is not to be

impeached by proof of any particular act of misconduct imputed to him in relation to some matter wholly disconnected with that to which his testimony relates.

Exceptions overruled.

The defendant then moved for leave to plead a certificate of discharge in insolvency; and this motion was argued by the same counsel at March term 1859.

MERRICK, J. After the exceptions to the ruling of the presiding judge, which were taken by the defendant at the trial, had been overruled in this court, he moved for leave to file a new answer to the declaration. The matter of defence, which he thus seeks to interpose to the maintenance of the action, is an alleged discharge from all his debts due on the 9th of February 1856, obtained in due course of proceedings under the several statutes concerning insolvent debtors and the equal distribution of their estates, since the rendition of the verdict in the present action. It was at first contended, in opposition to this motion, that it came too late, and could not, for that reason, be allowed. But now, in view of the decision in the case of *Lewis v. Shattuck*, 4 Gray, 572, it is properly conceded that this objection must be given up.

But although it is within the authority of the court to permit a new answer to the declaration to be put in at this stage of the proceedings in the case, the power will be exerted only when it is made to appear with reasonable certainty that the matter of which the defendant then seeks to avail himself has arisen or come to his knowledge since the rendition of the verdict, and will, if satisfactorily proved, constitute a complete and effectual defence against the action.

Upon the hearing of this motion, it was agreed by the parties, that after the commencement of the action, the defendant preferred his petition to the commissioner of insolvency for the county in which he resided, for the benefit of the "act for the relief of insolvent debtors and for the more equal distribution of their effects;" that such proceedings were had thereon, that he afterwards duly obtained a certificate of discharge from all

his debts, which were then provable against his estate, and that the cause of action set forth in the declaration was a debt due to the plaintiff, which was thus provable. After that discharge had been obtained, this cause proceeded to a trial which resulted in a verdict for the plaintiff for the amount of the debt which he claimed to be due to him. While the exceptions taken to the ruling of the presiding judge were subsequently pending in court, the defendant made a second petition to the commissioner of insolvency, for the benefit of the same act for the relief of insolvent debtors, upon which such proceedings were duly had, that he obtained a second discharge from all the debts which he was owing at the time of the first publication of the notice that a warrant under the statute had issued against him. The plaintiff did not prove or offer to prove his claim during the proceedings under either petition.

It was this second discharge obtained by the defendant, which he moved for leave to file as an answer to the declaration.

The motion must be denied; for, if granted, the defendant would derive no benefit or advantage from the facts which he relies upon and proposes to introduce as a defence. It has been determined, that if, in the course of proceedings had in pursuance of a first petition for the benefit of the laws relating to insolvent debtors, the petitioner fails to obtain a discharge from his debts, he will not be entitled to such discharge, under a second similar petition, from any debt which was provable under the former unless it is in fact proved and allowed under the second. *Gilbert v. Hebard*, 8 Met. 129. But if he duly obtains his discharge under the first petition, then there is nothing in relation to any debt which was provable under it, upon which the proceedings in pursuance of the second can have any effect or operation. The debt is in substance extinguished; no obligation for its payment afterwards rests on the debtor. It may be revived indeed, and his obligation renewed, by a subsequent promise of payment; but until it is so renewed, the debt, to all practical purposes, is as if it never existed. It is obvious therefore, that whether the discharge is in fact obtained by or withheld from and refused to the defendant under the first petition,

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that which is granted to him upon a second has no operation or effect upon a claim which, being legally provable under the former, was neither proved nor allowed under the latter. This is conclusive in relation to the defendant's motion. The discharge which he asks leave now to interpose as an answer to the declaration and a defence to the action, had no effect or operation whatever upon the cause of action set forth in the writ; and the attempt to avail himself of it would therefore be ineffectual and useless.

It was suggested in the argument, that the defendant may perhaps have revived his obligation by a new promise to pay the debt; and therefore that he might find it necessary to resort to the second discharge for his protection and security. Certainly, in the case supposed, it would be so. But he has been quite careful not to assert or to admit that he has bound himself by any promise, subsequent to the date of his first discharge, to pay the debt against which he is making defence. In the absence of any assurance or assertion on this subject, his motion must be disposed of without regard to any such supposed or possible contingency.

Motion disallowed.

DAVID S. GREENOUGH vs. JAMES F. WHITTEMORE.

An adjournment of the second meeting of the creditors of an insolvent debtor "to the time and place of holding the third meeting" is illegal; and a certificate of discharge granted at such adjourned meeting is invalid.

ACTION OF CONTRACT on a promissory note. Answer, a certificate of discharge in insolvency.

At the trial in the superior court of Suffolk, it appeared that the defendant was not present at the second meeting of his creditors in insolvency, and did not there take and subscribe the oath required by law; that the second meeting was adjourned "to the time and place of holding the third meeting," the third meeting not having there been ordered, nor the time appointed for it; that the third meeting was subsequently duly ordered,

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notified and held; and at the same time and place the adjourned second meeting was held, and the defendant took and subscribed the oath in due form.

Upon this evidence, *Abbott, J.* ruled that the adjournment of the second meeting was not a legal adjournment, and that the certificate of discharge was therefore invalid. The jury, under this instruction, found a verdict for the plaintiff, and the defendant alleged exceptions.

A. A. Ranney, for the defendant.

S. Albee, for the plaintiff.

METCALF, J. There can be no doubt that the commissioner had authority to adjourn the second meeting of creditors, and that all things done at a lawfully adjourned meeting are of like force and effect as if done at the original meeting. *St. 1838, c. 163, § 15.* But we are of opinion that the second meeting was not lawfully adjourned. An adjournment must be to a time and place certainly designated in the order therefor, and in the record of that order, and not to a time and place then uncertain, and to be made certain only by the happening of some future event. See 1 *Lil. Ab.* (2d ed.) 36; *Barr v. Chaytor*, 3 *Harring. (Del.)* 492. The creditors of an insolvent debtor, who attend a second meeting, or have legal notice of such meeting, may perhaps be bound to take notice of the time and place to which it is lawfully adjourned. At the least, they should be able to learn, with certainty, the time and place, from the records of the proceedings in insolvency, and cannot be required to watch for notice of the third meeting, for the purpose of ascertaining the time and place to which the second was adjourned.

As the meeting was not adjourned to a time and place of which the creditors, at the time when it was adjourned, could have knowledge, and as they had no subsequent legal notice of the time and place, we must hold that the adjournment was not legal, and that the acts done at the adjourned meeting were unauthorized and void. It is unnecessary, therefore, to inquire whether a second and third meeting of creditors can legally be held at the same time and place, as was proposed by the terms of the adjournment in question. *Exceptions overruled.*

LEVERETT SALTONSTALL vs. GEORGE W. BANKER & others.

A steam engine erected in a building situated on State Street in Boston, under a license from the board of aldermen, and with the safety plug required by law, is not a nuisance; and the landlord is not liable to third persons for any injury resulting to them from its maintenance or use by the tenant.

ACTION on the Rev. Sts. c. 104, to recover possession of two brick stores on State Street in Boston. The case was submitted to the court upon the following statement of facts :

The plaintiff, being the owner of the stores, agreed in writing to let them to the defendants for six years. After the making of the agreement, and before the commencement of the term, the defendants, with the consent of the plaintiff, bought the unexpired leases of the premises, and took possession of the stores, and put in a steam engine and machinery for grinding drugs, without the plaintiff's consent; and their design to erect such engine was not communicated to him when the agreement was made. The occupants of neighboring buildings complained to the plaintiff of the erection of the engine, and threatened to hold him liable for any damage resulting from the use of it. The plaintiff declined to execute and deliver the lease stipulated for in the agreement, on the ground that he would be thus liable, in case of injury to third persons by explosion of the boiler of the engine; and he demanded a removal of the boiler, or a bond of indemnity from the defendants; and on their refusing to make either, this action was brought.

It is admitted that the boiler and engine are of fair cost and quality, and are furnished with a safety plug, and that the erection of the same on the premises by the defendants was duly licensed by the mayor and aldermen of the City of Boston.

It is agreed that if the erecting the steam engine on the premises by the defendants at the time and under the circumstances set forth, or its future use by the defendants, would make the plaintiff responsible for injury caused by the explosion of the boiler, (whether arising from the negligence of the defendants' servants or not,) that then judgment is to be entered for the

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plaintiff; but if he would not, under these circumstances, be liable to any third party for any damage caused by said engine, he shall become nonsuit.

L. Saltonstall, pro se.

C. W. Loring, for the defendants.

MERRICK, J. This is a process under the landlord and tenant acts, prosecuted by the plaintiff to obtain possession of two stores situate in State Street in the City of Boston, which are owned by him, but are now held and occupied by the defendants. It is conceded by the plaintiff—and the argument in his behalf in support of the present proceeding, is placed wholly upon that ground—that unless it shall be adjudged by the court, that the steam engine erected by the defendants on the premises is, under the circumstances recited in the statement of facts, a public or private nuisance, this action cannot be maintained. We think it is perfectly clear that no such adjudication can be made. The law does not anywhere peremptorily declare that such a machine erected in a locality like that where this is placed, and to be used for the purposes for which this is said to be intended, is in fact, or is to be deemed and therefore treated as a nuisance. Stationary steam engines designed for use in any mill for planing or sawing of boards, or turning wood in any form, or where any other fuel than coal is used to create steam, are declared by statute to be nuisances, if erected or put up in any town or city of this commonwealth without a license therefor duly granted, or if they shall be used in any way contrary to the orders, rules and restrictions which may have been lawfully made concerning the building in which they are placed, the construction and height of the several smoke flues, and other particulars deemed material and requisite to the safety of the neighborhood. *St. 1845, c. 197, §§ 1-3.* And by another statute, any steam engine is to be deemed and taken to be a common nuisance, if it is used after the mayor and aldermen of any city or the selectmen of any town shall have issued a temporary order to suspend its use, because it appears to them to be unsafe; or if it is used after those officers, having first adjudged such engine unsafe or defective, shall have passed a

permanent order prohibiting its use until it shall have been rendered safe. *St.* 1852, c. 191, § 1.

It is not pretended that the steam engine erected by the defendants on the premises has ever been put in operation contrary to the spirit, or in violation of any of the provisions of these statutes; nor is there anything disclosed in the statement of facts, from which it can legitimately be inferred that it has at any time been an annoyance to the public at large, or rendered the enjoyment by any individual of his life or property either unsafe or uncomfortable. It is not shown therefore to be an illegal structure, subject to be abated, or making its proprietors responsible for its continued existence, either as a public or a private nuisance. *Rosc. Crim. Ev.* (3d ed.) 659. *Bac. Ab. Nuisance, A.* We do not mean to say that a steam engine may not, in consequence of its construction, location or employment, become a public or private nuisance, even if its proprietor violates none of the special and positive provisions of the statutes of this commonwealth, by which the use of such powerful machinery is intended to be regulated and controlled. But in this case the fact is not established. The defendants deny that their engine is on any account or for any reason obnoxious to any legal objection. And as the circumstances shown in the statement of facts agreed to by the parties do not prove it to be a nuisance, it follows as a necessary consequence of the plaintiff's own concession that his action cannot be maintained.

Without regard to that concession, it may be laid down in broader terms, that a landlord is not responsible to other parties for the misconduct or injurious acts of the tenants to whom his estate, when no nuisance or illegal structure existed upon it, has been leased for a lawful and proper purpose. In the case of *Rich v. Butterfield*, 4 C. B. 183, the law is accurately stated by Creswell, J., in these words: "If a landlord lets premises not in themselves a nuisance, but which may or may not become a nuisance, and it is entirely at the option of the tenant so to use them or not, and the landlord receives the same benefit whether they are or not, he cannot be made responsible for the acts of his tenant." *S. P. Lowell v. Spaulding*, 4 Cush. 277. It would be

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otherwise, if the nuisance existed at the time of the demise. *The King v. Pedly*, 1 Ad. & El. 822, and 3 Nev. & Man. 627.

If this objection to the maintenance of the action could be obviated, there are others which might perhaps be successfully argued; but as the plaintiff concedes that the defendants must prevail, unless the court first adjudge that their engine is a nuisance, it is unnecessary to take them into consideration.

Plaintiff nonsuit.

JOHN COE & others vs. THOMAS HARAHAN.

An agreement by tenants in common of land, to give "a good and sufficient warranty deed" thereof, is complied with by a deed in which each warrants his title to his own share only.

THOMAS, J. This is an action for damages for breach of contract in refusing to take land purchased of the plaintiffs at auction, and to pay for the same.

The case is before us on an agreed statement of facts. The only question made is as to the sufficiency of the deed tendered by the plaintiffs. The plaintiffs were to give "a good and sufficient warranty deed." They were tenants in common of the land. They made and tendered a deed in which each grantor warranted his several share, but not that of his co-grantor. This is clearly right. The purchaser was to have a warranty of title from him who conveyed, but not also a guaranty from others. If several deeds had been made with several covenants, the terms would have been complied with. The legal effect is the same in a joint deed with several covenants.

Judgment for the plaintiffs.

P. Ayer, for the defendant, was first called upon.

D. E. Ware, for the plaintiffs.

Silloway v. Columbia Insurance Company & another.

**DANIEL SIlLOWAY vs. COLUMBIA INSURANCE COMPANY &
another.**

Under the *St.* of 1851, c. 206, this court has jurisdiction in equity over the property of foreign corporations in this commonwealth.

Under the *St.* of 1851, c. 206, this court has jurisdiction to compel the application, in payment of a debt, of property which is not of a nature to be attached at law.

Any creditor alone may maintain a bill under the *St.* of 1851, c. 206, although the debtor has many other creditors, and is insolvent.

On a bill in equity under the *St.* of 1851, c. 206, against the agent of a foreign debtor, the defendant may retain sufficient of the property in his hands for the payment of his own services and expenses in taking care of and defending the title in the property.

BILL IN EQUITY, under *St.* 1851, c. 206, against the Columbia Insurance Company and Henry Edwards.

The bill alleged that said company were a foreign corporation, established by the laws of South Carolina, but during the period mentioned in the bill doing business in this commonwealth under the laws thereof; that during said period Edwards was their general agent for this state, appointed in pursuance of the statute in that behalf made; that the company had issued policies to the plaintiff, under which losses had occurred, which had been duly notified to the company, and which they were bound and admitted their liability to pay, but had failed so to do; and that therefore the plaintiff, both before the filing of this bill and the commencement of the action hereinafter mentioned, was and is a creditor of the company to the amount of about \$7,000; that the plaintiff had commenced an action at law against the company, to recover the amount due him under his policies, in this court for the County of Essex, and delivered the writ to an officer, with instructions to attach the property of the company, if any could be found; that said officer had made return, that after diligent search he could find no property of the company, which was by law attachable; and that the plaintiff had made diligent inquiries and search for any property of the company in this commonwealth, attachable by law, but could find none, and that there is none.

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The bill further averred that there is a large amount of valuable property, belonging to the company, now in this commonwealth, in the possession of Edwards, their general agent, but which cannot be come at to be attached, consisting of promissory notes given to the company in payment of premiums on policies of insurance issued by them in this commonwealth; that Edwards may pass said notes out of his possession or control into that of other agents or officers of the company, not residing in this commonwealth, and beyond the jurisdiction of this court; and that the plaintiff, in justice and equity, and especially by virtue of the *St.* of 1851, c. 206, is entitled to have the property now in the hands of Edwards applied to the payment of the debts due him from the company under said policies, and that he is entitled to the aid of this court of equity in that behalf. And the plaintiff prayed that Edwards might be enjoined from passing said notes out of his possession without the order of this court; for a discovery; for a delivery of the notes to the court; and that the amount due to the plaintiff might be determined, and so much thereof as may be necessary applied to the payment of his debts; and for other relief.

The company, in their answer, substantially admitted the averments in the bill, and alleged that before the filing of the bill many suits at law had been commenced against them, and other separate and similar bills had since been commenced against them; that they were embarrassed, and were and probably would be unable to pay their debts in full, and desired that all their assets should be appropriated in just and equal proportions, if the same should not be adequate to pay all such liabilities; that the amounts claimed in said suits are more than the amount of assets in said agent's hands; that if the plaintiff's prayer should be granted, he would obtain an unjust preference and priority in the distribution of their property over other creditors in and out of the Commonwealth; that all their property in said agent's hands, if this court have any jurisdiction over the same in equity, should be appropriated to the payment in just and equal proportion of all their creditors in this commonwealth.

The company denied that in justice or equity, or by *St.* 1851,

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c. 206, the plaintiff was entitled to have said property in the hands of said agent applied to the payment of his debt in preference to other creditors, and especially to such creditors in this commonwealth; and averred that by virtue of the *St.* of 1854, c. 453, if this court have any jurisdiction in equity, the said property should be applied equally to the payment either of all creditors in this commonwealth, or of all such as may come in and become parties to a suit in equity, in just and equal proportions, without preference or priority; that the plaintiff's bill ought to have been brought as a creditor's bill, and in behalf of himself and all creditors or such other creditors generally or in this commonwealth, as should come in and become parties to the same, and contribute to the expense thereof; that this bill was therefore defective and cannot be sustained; that the plaintiff has a plain, adequate and complete remedy at law; that the court had no jurisdiction in equity, and the plaintiff had no right to have the property in the hands of Edwards applied to the payment of his debts. And the defendants pray for the same benefit of their objections as if taken by demurrer or plea.

Edwards filed a similar answer, in which he claimed a lien for a balance due to him from the company for services, and for such expenses as he might be put to by reason of this bill or other litigation as to any rights in said property, and for his care and custody thereof.

The case was set down for hearing on the bill and answers.

E. Merwin, for the plaintiff.

C. T. Russell, for the defendants. The court has no jurisdiction of this bill. (1.) Because the *St.* of 1851, c. 206, applies only to "any debtor not residing in this commonwealth," and does not include foreign corporations.

(2.) Because the jurisdiction and power conferred upon this court by that statute are limited by the general principles and rules of equity; and under these there is no jurisdiction or power to attach, and apply to the payment of a debt, property like that in question, which cannot be attached at law, merely upon the ground that it cannot be so reached, without any special lien in

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equity attaching to it. *Jones v. Boston Mill Corporation*, 4 Pick. 509, 512. *Dundas v. Dutens*, 1 Ves. Jr. 196. *Rider v. Kidder*, 10 Ves. 360. *Neate v. Marlborough*, 3 Myl. & Cr. 407. *M'Kay v. Green*, 3 Johns. Ch. 56. *Donovan v. Finn*, Hopk. 74. *Shaw v. Aveline*, 5 Ind. 380. Adams on Eq. 129, 130.

The *St.* of 1851, c. 206, gives equity jurisdiction merely in aid of the law, to "reach" property which, being liable to attachment, or seizure on execution, "cannot be come at to be attached or taken on execution." It is intended to effect the same result as to such property, that the *Rev. Sta. c. 81, § 8*, do as to property secreted or withheld so that it cannot be replevied. It does not enlarge the creditor's rights as to such attachment or seizure.

(3.) Because, granting the plaintiff may have the relief alleged, still it can only be by a creditor's bill for all creditors. *Fisher v. Worth*, Busbee Eq. 63. *Hallett v. Hallett*, 2 Paige, 19. *Hendricks v. Robinson*, 2 Johns. Ch. 283. *Stephenson v. Taverners*, 9 Grat. 398. *Harris v. First Parish in Dorchester* 23 Pick. 112. Story Eq. PL. § 99 & notes. This rule alone secures the defendants from multiplied suits; secures equality among creditors, which is equity, and enables the court to deal with the whole fund. It also disposes of the fund in accordance with the general policy of the laws of the State. *St.* 1851, c. 327. In this case it appears by bill and answer, there are numerous creditors and suits already commenced.

(4.) In any event, Edwards should be allowed to retain a sufficient amount to meet his account for services, and costs, expenses and charges.

THOMAS, J. This is a creditor's bill, brought under the *St.* of 1851, c. 206. That statute is as follows: "The supreme judicial court shall have jurisdiction in equity, upon a bill by any creditor, to reach and apply, in payment of a debt due from any debtor not residing in this commonwealth, any property, right, title or interest, legal or equitable, of such debtor, within this commonwealth, which cannot be come at to be attached or taken on execution in a suit at law against such debtor."

The material allegations of the bill, which are either admitted

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in the answer or are to be taken as true on this hearing, are : That the said insurance company are a foreign corporation, doing business in this state ; that they are debtors of the plaintiff to the amount of about \$7,000 by reason of losses under their policies of insurance issued to him ; that he has in vain endeavored to secure said debt by the attachment of the company's property ; that the company have no property in this commonwealth, which can be come at to be attached ; that they have in the hands of their general agent here, the defendant Edwards, a large amount of promissory notes (over \$50,000) given for premiums on policies issued by them. The plaintiff prays that so much of this property as is necessary may be applied to the payment of his debt.

The answer, by way of demurrer, raises several questions of law :

1. Whether the court has jurisdiction ? This it has under the words of the statute.

2. Whether, by this process, the plaintiff may reach property not attachable ? The language is explicit—"any property, right, title or interest, legal or equitable."

3. Whether the bill may be brought by a creditor for himself alone, or whether he must bring a bill to which all creditors may become parties ? We think the statute clear in this respect also. It allows "a bill by any creditor to reach and apply in payment of a debt."

4. Whether Edwards may retain so much as may be necessary to meet a balance due him for services, and reasonable costs and charges ? This, upon the plainest principles of justice, he may.

Decree accordingly.

GEORGE C. SHATTUCK vs. JOSHUA LOVEJOY.

The assignment, without the approbation of the lessor, of a lease which contains a covenant that the lessee will not lease, underlet nor permit any other person to occupy without such approbation, does not determine the lease, without reëntry by the lessor; nor enable the lessor to maintain an action for use and occupation against one occupying part of the premises under the assignee before such reëntry.

ACTION OF CONTRACT for the use and occupation of the second story of a building in Hanover Street in Boston, for the quarter ending January 1st 1855.

At the trial in the court of common pleas, at October term 1855, before *Mellen*, C. J., the plaintiff's title as devisee of his father was admitted, and the plaintiff introduced evidence that the defendant occupied the rooms in question and paid the rent for the quarter ending October 1st 1854, and continued to occupy the rooms during the next quarter.

The defendant offered evidence that the plaintiff's father, on the 1st of January 1850 made a lease of the building to Nichols, Irish & Church for five years, which, through sundry mesne assignments, came to Shumway & Campbell; and that the defendant entered into possession of the second story in September 1854, and paid the rent of the whole premises on the 1st of October as Shumway's agent, and occupied as tenant at will of Shumway.

The lease contained a covenant that "the lessees will not lease, underlet nor permit any other person or persons to occupy or improve the same, but with the approbation of the lessor, or those having his estate in the premises, thereto in writing having been first obtained;" and also the usual provision for a reëntry in case of a breach of covenant. There was no evidence that the plaintiff or his father had ever had any knowledge of the assignments, or consented thereto; or had ever entered upon the premises or taken any steps to determine the lease.

The plaintiff objected to the admission in evidence of any of the assignments. But the court admitted them, and instructed the jury "that if the lease was in force during the quarter in

question, and the plaintiff or his ancestor had not assented to the assignments, he would have a claim on the original lessees for rent; if said assignments had been assented to, his remedy was against Shumway & Campbell; and that if they were satisfied that during the quarter in question the relation of landlord and tenant did not exist between the plaintiff and the defendant, but the defendant was tenant at will to Shumway, the plaintiff could not recover."

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

H. M. Parker, for the plaintiff.

L. H. Boutell, for the defendant.

BIGELOW, J. Upon the facts proved at the trial, the plaintiff cannot maintain this action. During the time for which he now seeks to recover against the defendant for use and occupation, the term of years, created by the lease of the whole estate by his father, was still outstanding. So long as this lease remained in force, the plaintiff's sole remedy for rent of the premises was either by an action on the covenant for its payment against the original lessees, or of debt against their assignees. *Wall v. Hinds*, 4 Gray, 266. The defendant stood in neither of these relations. He occupied a part of the demised premises under a verbal agreement with the assignees of the lessees. There was no privity of contract or of estate between him and the plaintiff. The defendant was only an undertenant of the assignees, holding that part of the estate occupied by him as tenant at will. Com. Landl. & Ten. 52, 248.

The breach of covenant by the lessees, by assigning the lease, and permitting other persons to occupy the premises, without the approbation of the lessor or those having his estate in the premises, did not terminate the lease and revest the estate in the lessor or his assigns. The remedy for such breach was either by an action for damages against the lessees, or under the clause in the lease which gave the right to reënter and expel the lessees or those claiming under them, in case they committed a breach of the covenants. In the latter case, after such reëntry, the lessor or his assigns would be in as of the lessor's old estate,

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and might claim for use and occupation of those who subsequently occupied the premises or any part of them. But until then the lease remained in full force, the term was still outstanding, and no claim could be made by the plaintiff for rent, except under the covenants in the lease, either against the lessees or their assigns.

Exceptions overruled.

WILLIAM WILLIAMS vs. JOHN H. CHENEY & another.

A promissory note given by a resident of this state for a premium on a policy of insurance made to him here by a foreign insurance company, who have not complied with the Rev. Sts. c. 37, and St. 1847, c. 278, § 2, is void in the hands of the company; although he is a mere agent for a citizen of another state, who is the owner of the property insured, and the policy is expressed to be "for whom it may concern."

An indorsee for value of a premium note given to a foreign insurance company, who have not complied with the laws of this state, cannot recover thereon, if he knew or had reasonable cause to know, when he took the note, that the company had not complied with such laws; and the fact that he was a director, treasurer and one of the executive committee of the company is sufficient evidence that he had reasonable cause of such knowledge.

ACTION OF CONTRACT on promissory notes made by the defendants to the Merchants' Mutual Insurance Company of Buffalo, N. Y., and by them indorsed to the plaintiff.

At the trial in the superior court of Suffolk, at January term 1856, before *Abbott, J.*, the plaintiff introduced evidence tending to show the following facts: The notes in suit were given by the defendants for premiums of insurance on policies issued through an agent of the company, residing in Boston. The contracts for insurance were made with the agent in Boston, and the policies were there filled up and delivered by him, and the notes were also there made and delivered to him by the defendants. The defendants acted, in obtaining the policies, merely as insurance brokers for the owners of the property insured, who were citizens and residents of Maine. The defendants had no interest in the property, but were paid a commission for obtaining the insurance, and the policies were issued to them "for whom it may

concern," and made payable to them in case of loss. They had received from their principals the full amount of some of the notes, and their commissions, before the notes fell due. The notes were indorsed by the insurance company to the plaintiff before they were due, as security for a loan of money made by him to the company, which still remained unpaid.

The defendants introduced evidence that the insurance company was established in 1849, and began to do business through their agent in Boston in 1850, but had not complied with the provisions of Rev. Sts. c. 37, and St. 1847, c. 273; that the plaintiff was a large stockholder in the company from its origin, and a director and treasurer until after the giving and indorsing of these notes, and for three months previous to the taking of the notes was one of the executive committee, and took an active part in its management, though his duties related particularly to its finances. The sole control and management of the business was by the charter vested in the directors. It was admitted that the plaintiff knew that the notes were taken by the agent in Boston for premiums on policies issued there by him.

The court instructed the jury "that if said insurance company, at the time of issuing the policies through their agent in Boston, for the premiums on which the notes in suit were given, had not complied with the requirements of the laws of Massachusetts applicable to them, then said notes would be void, and could not be recovered by said insurance company; that it would make no difference, in this cause, that the policies of insurance were made on property belonging to citizens and residents of other states, provided said policies were made by said company's agent in Boston, and the contract of insurance was made there and with a citizen of this state, who gave the notes in suit for the premiums, and the policies were issued to him for the benefit of whom it might concern, payable to him in case of loss, although he was a mere broker for the owners of the property insured and had no interest therein, and was paid a commission for procuring such insurance; and that the fact that the defendants had been paid the full amount of any of the

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notes in suit by the owners for whom they acted, before the maturity of said notes, would not affect the question of their liability in this action."

The court further instructed the jury "that the plaintiff, having taken the notes in suit before their maturity, would be entitled to recover, unless the defendant satisfied them that he knew at the time he took the same that they were given for premiums on policies of insurance issued by the company in violation of the laws of Massachusetts, or had reasonable cause to know it; that from his relation to said insurance company, as director and treasurer, he was presumed and bound to know the law of this state applicable to the transaction of such business as said company undertook to transact in this commonwealth; and that it being the duty of the directors, by the charter, to exercise the entire control over the business of the company, the jury had a right to find and presume from his position as director and treasurer, and one of the executive committee of said company, and his general connection with it, that he knew, or had reasonable cause to know, that the officers of said company in New York had not done the acts necessary to comply with the laws of this state."

The jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

H. Jewell, for the plaintiff. 1. The contracts of insurance were valid contracts, upon which the real assured, the owners of the property, might have maintained actions. The form of the policies—"for whom it may concern"—shows that a principal was known to exist. The contracting parties were the insurance company on one side and the non-resident owners on the other. 2 *Arnould on Ins.* § 433, *Amer. note.* *Farrow v. Commonwealth Ins. Co.* 18 Pick. 53. *Reed v. Pacific Ins. Co.* 1 Met. 171. *Hurlbert v. Pacific Ins. Co.* 2 Sumner, 471.

The Rev. Sts. c. 37, and the St. of 1847, c. 273, do not prohibit such contracts. They were passed for the protection of the citizens of this commonwealth in the insurance of their property. Non-residents are not within their terms or spirit. *Ilseley v. Merriam*, 7 Cush. 242. *McNutt v. Bland*, 2 How. 9.

They are penal statutes, and not to be extended by implication.

It is clear that the owner might have got the insurance himself. He might have employed a non-resident agent to do so. Can he not also employ an agent resident in this state? Could the company's agent, having made this contract to insure property of a non-resident, be indicted to recover the forfeiture specified in the Rev. Sts. c. 37, § 43.

After payment of the notes to the defendants, there can certainly be no objection of a want of consideration.

2. The ruling, that the situation of the plaintiff and his means of knowledge might be taken into consideration by the jury, was erroneous, in making negligence, and not good faith or actual knowledge, the test of his right to recover. *Raphael v. Bank of England*, 17 C. B. 161.

C. E. Pike & B. Dean, for the defendants.

DEWEY, J. This case has heretofore been before the court, and as to many of the questions arising thereon has been finally disposed of, as may be seen in 3 Gray, 215. Two points are now taken, which are supposed to be open upon the case as presented on the new trial which has been had before the jury.

1. It is said that, however true it may be that the policies, and the notes given as premiums therefor, would have been illegal, had the transaction taken place on the account of a resident of Massachusetts; yet such is not the case where the policies are really effected for a citizen of the State of Maine, through an agent residing in Boston, and the policies made, as the present were, "for the benefit of whom it may concern." Such a policy, it is said, enures to the benefit of the real party in interest, and may be sued in his name, and is therefore, although in form made in the name of his agent, yet in reality a contract with the principal, a citizen of Maine.

The first inquiry is therefore whether a policy made by a foreign insurance company, through an agent residing in Boston, solely for the benefit of a citizen of Maine, is illegal, if there has been a failure to comply with the provisions of our statutes regu-

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lating foreign insurance companies, who may have established agencies in Massachusetts.

Looking at the general provisions on this subject in the Rev. Sts. c. 37, §§ 41-43, we should suppose that the statute had prohibited the establishment of foreign agencies here, for the purpose of making any insurance, unless they had previously complied with the provisions of our statutes as to filing and publishing certain statements of the business of the company, its funds, &c. Such positive prohibition would, without any penalty being annexed thereto, render the making of insurances here illegal. It is true, however, that in other sections of the statute, imposing a penalty upon the agent who should proceed to make and issue policies here, the case which subjects the agent to the penalty is that of making a contract for insurance within this state and with persons resident in this state. The St. of 1847, c. 273, is much to the like effect. Although this be so, yet if the general prohibition be broader and forbids making any policy through an agent residing in Massachusetts, that would have the like effect, and be equally fatal to this contract, as though forbidden under a penalty named. We are strongly of opinion that such was the intention and such the effect of the Rev. Sts. c. 37.

But if it were otherwise, the defence is equally well maintained. These contracts were actually made with a resident of Massachusetts. The defendant was the only party whose name appeared upon the policies. The plaintiff does not deal with him as agent, but as principal. He treats the notes given by the defendant for the premiums as his personal notes. Whatever rights might pass to others as to enjoying the fruits of the policies, in case a loss had occurred, it is no less true that the contracts were in fact made with a resident of Massachusetts, and are now sought to be enforced against him as his contracts. The defendant is therefore entitled to the full benefit of the defence arising under the provisions of the statute. The insurance company having neglected to comply with the requisitions of law, if the suit upon the notes were brought in the name of the company, this would constitute a good defence.

2. But the notes having been negotiated before they became due and payable, the further inquiry is whether the plaintiff is to be affected by this illegality in the contracts, and the notes avoided in his hands for that cause. It is conceded that the plaintiff knew, at the time he took these notes, that they were taken by an agent of the insurance company in Boston, for premiums on policies of insurance issued by such agent. The only further point to be established in the defence was, that the plaintiff knew that the policies were issued by the insurance company in violation of the laws of Massachusetts. The court instructed the jury, as to this, that the plaintiff was entitled to recover upon the notes, unless the plaintiff knew or had reasonable cause to know, that the notes were so given in violation of the laws of Massachusetts, and that from the facts shown, and particularly detailed in the charge to the jury, they had a right to find such knowledge, or reasonable cause to know, that the policies were issued in violation of the laws of Massachusetts. This ruling was, as we think, correct, and adapted to the case.

Exceptions overruled.

JAMES W. PAIGE & others vs. WILLIAM PARKER, 2d.

A guaranty, delivered by the guarantor to the guarantee, of the payment of any sales to be made to a third person, binds the guarantor, without proof of a promise of the guarantee to make such sales, or of formal notice of the acceptance of it, or of notice to the guarantor of each sale as it is made.

A notice of the amounts due under a guaranty, and of a demand upon the principal and his refusal to pay, made before suing on the guaranty, is sufficient, if it does not appear that the defendant had suffered any loss by the delay.

ACTION OF CONTRACT by the assignees in insolvency of I. W. Blodgett & Company, upon a guaranty, dated the 29th of November 1852, the material parts of which were thus: "The said William Parker, 2d, for value received, and in consideration of sales made or to be made to Rutha Ann and Elizabeth Stocker, of Saugus, doth hereby guaranty unto J. W.

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Blodgett & Company, the prompt payment, at maturity, by said Rutha Ann and Elizabeth Stocker, of any and all sums of money which shall be or become due and payable to them on account of such purchases" to the amount of five hundred dollars. "This guaranty shall apply to all purchases which may be made by said R. A. & E. Stocker of said J. W. Blodgett & Company, before written notice shall be given by said Parker to them of the withdrawal thereof as to future purchases."

At the trial in the superior court at January term 1856 before *Abbott, J.*, there was evidence that the guaranty was signed by the defendant at its date, in the store of J. W. Blodgett & Company, and left with them; that the Stockers were not present at the time of the signing, and that Blodgett & Company did not then make any promise to sell them goods, but afterwards, on the faith of the guaranty, made sales to them on six months' credit; but no notice was given to the defendant, either of the commencement of sales, or of sales from time to time, until the 10th of August 1853, after all the sales had been made, when the following letter was written by Blodgett & Company to the defendant: "We wish you to call and see us in relation to your guaranty for the Misses Stocker; they do not pay up promptly."

It also appeared that Blodgett & Company, in January 1854, brought an action against the Stockers for the price of the goods sold them, and obtained judgment therein, but could collect nothing under the execution; and that the plaintiff, on the 8th of December 1854, before bringing this suit, gave formal notice to the defendant of said sales, and of a demand upon the Stockers and their refusal to pay, and demanded of the defendant the amount due.

The defendant asked the court to instruct the jury that in order to maintain this action Blodgett & Company should have given notice to the defendant of a commencement of sales to the Stockers upon the faith of the guaranty, and of the subsequent sales from time to time as they were made, and that the letter of August 10th was not such notice or demand.

The court declined so to instruct the jury, and instructed them that if the guaranty was signed by the defendant and by him delivered to the plaintiffs at that time, no notice was required to be given by Blodgett & Company to the defendant, either of the commencement of sales upon the faith of the guaranty, or of the sales made from time to time, and that, taking the testimony to be true, sufficient notice was given to the defendant by Blodgett & Company of the failure of the Stockers to pay, before the commencement of this action, and a sufficient demand was made.

Under these instructions a verdict was taken for the plaintiffs, and the defendants alleged exceptions.

O. Stevens, for the defendant, cited *Wildes v. Savage*, 1 Story R. 22; *Edmanston v. Drake*, 5 Pet. 624; *Douglass v. Reynolds*, 7 Pet. 126, and 12 Pet. 497; *Lee v. Dick*, 10 Pet. 482; *Adams v. Jones*, 12 Pet. 207; *Bell v. Kellar*, 13 B. Mon. 381; *Norton v. Eastman*, 4 Greenl. 526; *Tuckerman v. French*, 7 Greenl. 117; *Craft v. Isham*, 13 Conn. 28; *Cremer v. Higginson*, 1 Mason, 340; *Clark v. Remington*, 11 Met. 361.

J. D. Ball, for the plaintiffs.

METCALF, J. The first suggestion made by the defendant in support of these exceptions is, that the contract was not binding on him, because it was not binding on Blodgett & Company when it was made; they not having then promised to sell upon the faith of the guaranty. But it is a common learning, that there are valid contracts which are not binding on both parties at the time when made. In *Morton v. Burn*, 7 Ad. & El. 23, Patteson, J. said: "Suppose I say, if you will furnish goods to a third person, I will guaranty the payment; there you are not bound to furnish them; yet, if you do furnish them in pursuance of the contract, you may sue me on my guaranty." In *Kennaway v. Treleavan*, 5 M. & W. 501, Parke, B. made a similar statement of this familiar law.

The next point taken by the defendant is, that Blodgett & Company did not give him notice that they had accepted his guaranty. On this point, a distinction, which is sometimes overlooked, is to be taken between a guaranty and an offer of a

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guaranty. In the case of an offer of a guaranty, as in the case of any other offer or proposal, an acceptance thereof, seasonably made known to the party offering, is necessary to the completion of the contract. But express notice of the acceptance of an absolute guaranty is not always, if ever, necessary for the purpose of binding the guarantor. In the State of New York, the courts hold that no notice of acceptance is necessary, when a guaranty is absolute. *Union Bank v. Coster*, 3 Comst. 212. See also *Farmers & Mechanics' Bank v. Kercheval*, 2 Mich. 511. However this may be, we are of opinion that the defendant, in this case, had notice that his guaranty was accepted. An absolute guaranty was written by Blodgett & Company, in their store, and for their benefit; the defendant signed it there, and left it with them as a completed contract; and they retained it. This was an acceptance by them, of which he must be held to have notice. As was said by Storrs, J., in *New Haven County Bank v. Mitchell*, 15 Conn. 219, a formal notice of acceptance, in addition to this, would have been an act of supererogation. We are satisfied with the reasons given for the decision in that case, which is not distinguishable from this. The distinction is there well shown between a guaranty like this and the numerous cases that have been decided on letters of credit, where express notice of acceptance has been held necessary in order to charge the party signing them.

The defendant objects further, that he is not bound by his guaranty, because he did not receive notice, from time to time, of the sales made to R. A. & E. Stocker. This objection was not pressed, and it has no force. The decisions are uniform, that after acceptance of a continuing guaranty like this, of payment for goods to be sold, the seller ordinarily need not give the guarantor notice of the sales made, until a reasonable time after default made by the buyer. There is nothing in this case which takes it out of the ordinary rule of law. *Douglas v. Reynolds*, 7 Pet. 126. *Wildes v. Savage*, 1 Story R. 32. *Craft v. Isham*, 13 Conn. 36, 37. *Clark v. Remington*, 11 Met. 365. *Howe v. Nickels*, 22 Maine, 179.

The last point made by the defendant is, that he had not,

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before action brought, notice in due form and in due season, of the amount claimed of him under his guaranty. We think he had. The notice given to him on the 8th of December 1854 contained a full statement of the account between Blodgett & Company and R. A. & E. Stocker, and a special demand on him for payment. This brings the case within the decision in *Curtis v. Hubbard*, 9 Met. 322. The notice was also seasonable; it not appearing that the defendant suffered any loss by reason of not receiving it earlier. Such is the established doctrine in this commonwealth. *Salisbury v. Hale*, 12 Pick. 424. *Bickford v. Gibbs*, 8 Cush. 156. *Exceptions overruled.*

HIRAM STEVENS vs. SAMUEL SAYWARD & another.

When a portion of goods, shipped by one entire contract of affreightment, is lost by fault of the carrier, and the residue sold by him by the bill of lading at the port of delivery, without knowing such loss, the carrier, if sued by the consignee for money had and received from the proceeds of the sale, cannot deduct the freight; but may deduct a discount allowed by him to the purchaser on discovering the deficiency in the goods.

ACTION OF CONTRACT for money had and received, being the net proceeds of the sale at San Francisco of certain goods carried there from Boston by the defendants, consigned to the plaintiffs.

The defendants, in their answer, admitted the receipt of the money, and claimed to hold it for the payment of freight due under the bill of lading, and of expenses of storage, and of \$75 paid by them as a discount to the purchaser of the goods.

At the trial in the superior court of Suffolk at January term 1856, before *Abbott, J.*, the following facts appeared: The articles named in the bill of lading were parts of an entire house. Some of them were lost by reason of being improperly stowed, under such circumstances that the defendants had no right to recover freight, as was decided in 3 Gray, 97. Upon the arrival of the ship in San Francisco, the defendants advertised

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for the consignee, and, after waiting beyond the time stipulated in the bill of lading, sold the goods as described in the bill of lading, without examining the goods, or knowing whether the whole house had arrived.

The plaintiff having waived all other counts in his declaration, except that for money had and received, the defendants asked the court to rule that the plaintiff, by seeking to recover in this form of action the proceeds of the sales of the shipment, had ratified and adopted that sale, and the delivery of the articles which was in fact made under it, and waived a strict performance of the bill of lading, and was thereby estopped to deny the full performance of the contract; and the defendants were therefore entitled to deduct the freight due them by the bill of lading on this shipment, before paying over the proceeds of the sale. But the court refused so to rule.

The defendants also offered to prove that after making the sale for the sum claimed, they were obliged to allow, and did allow, in good faith, to the purchaser, \$75 on account of the goods lost. But the court ruled that this would contradict their answer, which admitted the receipt of the full sum; and rejected the evidence.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

L. Shaw, Jr. (J. J. Clarke with him,) for the defendants, cited *Miller v. Miller*, 7 Pick. 136; *Stevens v. Sayward*, 3 Gray, 111; Story on Agency, §§ 239, 250, 259, and cases cited; *Smith v. Hodson*, 4 T. R. 216; *Jones v. Hoar*, 5 Pick. 290; *Butler v. Hildreth*, 5 Met. 49; *Browning v. Bancroft*, 8 Met. 278; *Peters v. Ballistier*, 3 Pick. 495; *Kelly v. Munson*, 7 Mass. 323; *Young v. Marshall*, 8 Bing. 43; *Lindon v. Hooper*, Cowp. 419; 2 Greenl. Ev. § 120, and cases cited.

S. J. Thomas & S. J. Gordon, for the plaintiff.

BIGELOW, J. The question raised by those exceptions has already been determined by the opinions given when this case was before the court at a former term. 3 Gray, 108. The defendants have earned no freight, and cannot set off any claim therefor against the sum which they owe the plaintiff for the

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proceeds of his property which was sold by them at San Francisco.

The attempt to make the plaintiff liable, by way of set-off, for a debt which he does not owe, because he seeks under a count for money had and received to recover the proceeds of his property, instead of by a count in tort, in the nature of trover, to obtain damages for its conversion, is quite novel, and cannot be supported on principle or authority. The form of action does not change the substantial rights of the parties. Its only effect is to limit the claim of the plaintiff to the net amount of money received by the defendants for the sale of the goods, instead of leaving it open to him to recover their actual value at the time of the conversion, although much greater than the sum received for them by the defendants. In this respect, the form of action in the present case is most beneficial to the defendants; in all others, the rights of the parties are not affected by it. When, therefore, it is said that the plaintiff by his form of action has ratified the sale of the goods by the defendant, nothing more is meant than that the plaintiff waives all damages in tort, and demands only the sum which has come to the defendant's hands by reason of the sale. He does not ratify any preceding breaches of contract, or waive any claims in his favor, which accrued prior to the sale. On the contrary, the whole claim of the plaintiff in the present case is founded on the breach of the contract of the defendants as carriers. If they had fulfilled their contract and earned freight, they would have had a lien on the property for more than its value, and the plaintiff could have maintained no action for the proceeds of the sale. It would indeed be strange, if the form in which the plaintiff brought his action should not only defeat his own claim which he sought to enforce by it, but should also create a demand against him in favor of the defendants, which had no existence before the plaintiff commenced his suit.

The plaintiff, however, is entitled to recover only the amount received by the defendants, after deducting all reasonable charges and expenses. The sum refunded to the purchasers of the lumber should be allowed to the defendants, because it was in fact

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a reduction of the price for which the lumber was sold, by reason of a deficiency in certain articles included in the sale. It cannot be therefore now held to have been received to the plaintiff's use. The answer of the defendants does not preclude them from claiming this deduction. If the sum is remitted, the entry will be

Exceptions overruled.

LOTAN GASSETT vs ERASTUS W. SANBORN.

In an action of tort against an officer for taking on attachment against a third person chattels mortgaged to the plaintiff, the declaration need not allege that the demand made by the plaintiff on the officer, as required by the Rev. Sts. c. 90, § 79, contained a just and true account of the mortgage debt.

A demand, under the Rev. Sts. c. 90, § 79, on an officer attaching chattels mortgaged, which describes a mortgage of a certain date, made to secure the sum of \$300 with interest from said date, and gives notice that the plaintiff claims "said sum of \$307.90," as due him on said mortgage, is sufficient.

ACTION OF TORT against a deputy sheriff. The declaration averred that the defendant took and carried away certain furniture, of the value of \$173, formerly the property of Benjamin Graffani, and by him mortgaged to the plaintiff; and that the plaintiff demanded of the defendant payment of the money due to him, pursuant to the Rev. Sts. c. 90, § 79, and served on the defendant a notice (a copy of which was annexed) that the property was mortgaged by Graffani to the plaintiff on the 18th of June 1853, to secure the payment of three promissory notes of that date, one for \$125 in eight months, one for \$100 in fourteen months, and one for \$75 in twenty months, and each with interest, and demanded "payment of and indemnity for" \$175 owing to the plaintiff on said notes and mortgage; yet the defendant had not paid that amount, nor returned the furniture.

Answer, that the defendant took the property on mesne process against Graffani; that it was liable to be so taken; and that the plaintiff's mortgage was fraudulent and void.

At the trial in the court of common pleas at January term

1855, it appeared that the defendant, as a deputy sheriff, attached the goods as the property of Benjamin Graffani, being then in his possession; and that the plaintiff, about the time of the attachment, served upon the defendant the following demand in writing: "Sir, You having attached personal property mortgaged to me by Benjamin Graffani by mortgage dated June 18th 1853, recorded in the city record of mortgages, lib. 87, fol. 297, to secure the payment of three hundred dollars and interest from said 18th day of June 1853, are hereby notified that I claim to hold the said property as security for the payment of the said amount owing to me by the said Graffani; and I hereby demand payment of the said sum of three hundred and seven dollars and ninety cents, owing to me on said mortgage."

It also appeared that the defendant afterwards sold the goods under the execution which issued in the action in which they were attached; and that four months after this sale the plaintiff made upon the defendant a second demand, which was the one annexed to the declaration.

The plaintiff introduced, as evidence of the amount of the mortgage debt, three notes, described in the second demand, which bore no indorsements of any payments. The defendant moved for a nonsuit, because the declaration did not duly allege that the account stated in the written demand was a just and true account of the debt, and because there was no proof that it was so, and because the account did not specify the different amounts claimed; (for which he cited *Rev. Sts. c. 90, §§ 78, 79*; *Harding v. Coburn*, 12 Met. 333; *Johnson v. Sumner*, 1 Met. 178;) and also because the demand was not made within a reasonable time. *Mellen*, C. J. overruled the motion, and submitted the case to the jury, who returned a verdict for the plaintiff; and the defendant alleged exceptions.

J. B. Robb, for the defendant.

F. W. Dickinson, for the plaintiff.

MERRICK, J. The motion for a nonsuit was very properly denied. It was not necessary for the plaintiff to allege in his declaration in this action that the amount demanded by him of the defendant was a just and true account of the debt or de-

mand for which the property attached was liable to him under the mortgage by force of which he claimed to hold it. The declaration sets forth in accurate terms the seizure, conversion and value of the goods and chattels alleged to have been taken by the defendant, and of the interest therein which is claimed by the plaintiff; and is much more particular and exact than is required in the form prescribed by the *St.* of 1852, *c.* 312. Being a full and legal statement of the injury of which he complains, and of the right he intends to assert, the plaintiff is permitted under it to prove all the facts essential to the maintenance of his action.

The first demand which was made upon the defendant, and which was produced in evidence upon the trial, without objection, was in all respects ample and sufficient; and was in such compliance with the provisions of the statute as to render a dissolution of the attachment a necessary consequence of it, unless the amount due to the plaintiff was thereupon duly paid or tendered to him. The demand was in writing; and although the day on which it was made is not stated, it is said to have been about the time of the attachment; and no objection has been intimated that it was unseasonable or improperly delayed. It specified the date of the mortgage, and the exact amount secured by and due upon it, to wit, the sum of three hundred dollars, with interest thereon from the date named; and required the payment of the aggregate of those sums as the amount then justly due to the plaintiff. Nothing could be more explicit than this. Upon the trial the plaintiff produced evidence tending to prove that the amount thus presented to the defendant was just and true; and this has been affirmed by the verdict. Judging from the facts which are stated in the bill of exceptions, we do not see how the jury could rightly have come to any other conclusion. The plaintiff produced the notes secured by the mortgage, without any indorsements thereon; and in the absence of any evidence to the contrary, the presumption of law is that they remained unpaid.

As the demand upon the defendant was sufficient to meet all the requirements of the law, and as the money due to the plain-

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tiff was not paid nor tendered, the attachment upon the mortgaged property was thereupon, by operation of the statute, immediately dissolved. The subsequent retention and sale on execution of the property were a conversion of it to his own use, which made the defendant liable in an action of tort for its value.

Upon those considerations alone the plaintiff is clearly entitled to judgment on the verdict rendered in his behalf; and there is therefore no occasion to discuss any of the other questions raised at the argument. In the view we have taken of the character and effect of the first demand, it is immaterial whether the second was within or beyond a reasonable time.

Exceptions overruled.

PRESIDENT, DIRECTORS AND COMPANY OF THE WARREN BANK
IN DANVERS *vs.* MATTHEW S. PARKER.

It seems, that after the indorser of an overdue promissory note, with the means of knowing what demand has been made on the maker, has paid the note, no action can be maintained by the holder against a notary for negligence in making a demand on the maker; although at the time of such payment, the holder authorized the indorser to bring such an action in the holder's name against the maker.

A bank in Boston, with whom a promissory note was placed for collection, gave notice to the maker before the note fell due, according to the usage in Boston, of the day when the note would be payable, and requested him to come and pay it; and the note remained in the bank through banking hours of that day. *Held*, that if the maker was a trader, and accustomed to transact business at the bank, his consent to the general usage which made such notice sufficient might be shown, and, if shown, rendered any other demand immaterial.

ACTION OF TORT. Trial in the court of common pleas at April term 1855, before *Mellen*, C. J., to whose rulings the defendant alleged exceptions, the substance of which is stated in the opinion.

SHAW, C. J. This is an action of tort, by the Warren Bank of Danvers against a notary public of Boston, charging him with neglect of official duty, by means of which they have sustained damage. The ground of the charge is, that they were

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the holders of a promissory note discounted by them, the maker of which resided in Boston; that the plaintiffs, through their agents the Suffolk Bank, employed the defendant, as a notary, to present the note to the promisor and demand payment; and, in case of nonpayment, to give due notice to the indorsers. They aver, that in performing this duty, he conducted himself so negligently that he did not make demand on the promisor, or use due diligence to find him, or his place of business or place of abode, by means of which the plaintiffs lost the right to charge the indorsers, and lost the value of the note.

1. This being an action of tort, imputing a wrong done by one in whom confidence is reposed, by the very nature of the office which he holds, such a charge can be established only by full and satisfactory proof of the facts on which it is made. The fact of negligence must not only be proved, but the further fact, that the plaintiffs thereby sustained damage. It is one of those cases where actual loss sustained is the cause of action; where it was necessary, under the old forms of pleading, to declare with a *per quod*, that is, that by means of the alleged neglect the plaintiffs actually received damage and loss.

Another important consideration is, that, upon the record, this is a suit by the Warren Bank against the defendant; and the question is, whether, at the time this action was commenced, they had sustained any loss, by negligence of the defendant, for which they could maintain an action. They had before that time received the amount of the note, with all costs and expenses, from Robinson, an indorser, and the person at whose instance they had discounted the note. The bank, on its return by the Suffolk Bank to Danvers dishonored, charged the amount with the expenses to Robinson, and sent him the note, with a letter from the Suffolk Bank, containing all the intelligence they had respecting its nonpayment.

The case has been argued as if it were clear upon the evidence, that Robinson, for whose benefit this suit is brought, after having paid and taken up the note, if there had been no legal demand on the promisor, might recover back the amount from the bank, we suppose on the authority of *Garland v. Salem*

Bank, 9 Mass. 408. But the circumstances are very different. There, not only had there been no demand, but the facts were in effect concealed from the plaintiff till after he had taken up the note, and he, having learned the facts, immediately demanded repayment of the money.

Here, the plaintiffs themselves never made any claim on the defendant for the supposed negligence. When Robinson claimed to have his money repaid, the plaintiffs never did repay it, and never yielded to that claim, or admitted it. The most they did was to say to Robinson, "If we have any claim on the notary, under the circumstances, or if you think we have, and will secure us against all expenses, we will consent that you may try it." In pursuance of such permission this action is brought. The plaintiffs themselves have sustained no loss.

The evidence tends to show that the indorser, Robinson, settled his account with the bank, with the full means of knowing all that had been done. It is the right of an indorser, if he thinks fit, and it is often for his interest, to take up the note he has indorsed, and make it his own, although he himself may not have had due notice of its dishonor. *Ellsworth v. Brewer*, 11 Pick. 316. If he thus paid it, without further inquiry, there is ground to infer that he did it voluntarily; and if in fact he did pay it voluntarily, upon a claim of right, knowing, or with the means of knowing, his right, he could not recover it back, merely by showing that, if he had resisted, he might have had a legal ground of defence. So if, after a full knowledge of all the facts, Robinson released to the plaintiffs all right to recover back the money, it is difficult to perceive how the plaintiffs could sustain any loss. Robinson took up the note, treated it in all respects as his own, and brought an action upon it for his own benefit, in the name of Pratt, his immediate indorser, against Johonnot a prior indorser. We are not aware upon what grounds the judgment in that case, and especially the facts and principles in which it was decided, could be competent evidence in this case, being wholly *res inter alios*. But it was admitted and relied on.

2. But there is another ground on which there was a misdi-

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rection. The ground of this action is, that there was negligence on the part of the defendant, in making demand on the promisor. There is no intimation that there was not due notice to the indorsers. Taking the facts together as they appear in the report, they are these: The note was placed in the Suffolk Bank for collection. It remained in the bank during all the banking hours of the last day of grace; after the close of the bank, the note was delivered to the defendant, in order to present it to the promisor for payment, and, in case of nonpayment, to give notice to the indorsers. And the negligence of the defendant, in making this afternoon demand, is that relied on by the plaintiff.

But if there was a previous valid demand, sufficient to charge the indorsers, then the insufficiency of the demand in the afternoon was immaterial. It appears by the report, that the defendants claimed the right, and offered to show, that the note was rightly placed in the bank for collection; that the usual notice was issued from the bank to the promisor, before the note became due, that the note would be payable on a certain day named, being the true day, and he was requested to come and pay it; that it remained in the bank during banking hours of that day, and remained unpaid. Now if the promisor was a trader, and accustomed to transact business at the bank, his consent to the general usage, which made such notice a good presentment and demand, might be shown; and indeed the usage has now been so universal in Boston, and so long continued, that slight evidence would be sufficient to prove acquiescence on the part of any trader, and thus make this established mode of demand a sufficient one. This has been settled by a long course of practice and sanctioned by many judicial decisions. *Gilbert v. Dennis*, 3 Met. 495. *Mechanics' Bank v. Merchants' Bank*, 6 Met. 23. And if this was a mode of presentment and demand, to which the promisor had agreed, either expressly or by implication, then nonpayment at the bank, by the promisor, on the last day, during usual banking hours, was a dishonor, sufficient, on notice, to charge the indorsers, to whom notice might be then immediately given. *Whitwell v. Johnson*, 17 Mass. 449.

Had this evidence, which we think was incorrectly rejected.

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been received, and had it been sufficient to establish the facts which it conduced to prove, it would have rendered the question whether the defendant made a valid demand in the afternoon immaterial. For, though it is not unusual for banks, after the dishonor of a note by nonpayment at the bank, to deliver the note to a notary, in order to make actual demand on the promisor; yet it is for greater caution, and for the convenience of taking and preserving the evidence of the facts; it is not necessary to the rights of the holder, or to fix the liability of the indorser. The evidence would have shown, that if the demand made by the defendant was not regular and legal, still the plaintiffs sustained no loss by it; and this would have been a bar to the action.

Exceptions sustained.

C. T. Russell, for the defendant.

H. F. Durant, for the plaintiffs.

SAMUEL SHEPHERD *vs.* JOSEPH CHAMBERLAIN.

A demand of payment of a note payable at a particular bank, made at that bank after the close of business hours, to which the officers of the bank answer that the maker has no funds there, is sufficient to charge an indorser.

ACTION OF CONTRACT against the indorser of a promissory note payable at the Merchants' Bank in Boston. Answer, want of demand on the maker, and of notice to the defendant as indorser.

At the trial in the court of common pleas at April term 1855, the plaintiff called a notary public, who testified that the note was put into his hands for protest on the last day of grace; "that after two o'clock on that day he called on the Merchants' Bank, and made demand of payment, and answer was made that they had no funds there for that purpose; and that afterwards, on the same day, he gave notice to the defendant as indorser; that business hours at the banks of Boston expired at two o'clock, and they then stopped paying out checks."

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Mellen, C. J. instructed the jury that "the demand on the bank after business hours on the last day of grace, as in this case, was *prima facie* evidence of dishonor and of a valid demand, on which notice might be given to the indorser." The jury returned a verdict for the plaintiff: and the defendant alleged exceptions.

F. W. Sawyer, for the defendant.

H. L. Hazelton, for the plaintiff.

SHAW, C. J. The single question in this case is, whether due demand was made on the promisor by the notary public. We consider the evidence that the hours of business at the banks in Boston usually ended at two o'clock for some purposes, including paying checks, immaterial. Whatever was the custom of the bank about closing business, it was open when the notary went, and officers were there competent to answer, and their answer was competent to show that the promisor had no funds there for the purpose of paying the note demanded; this was a default, and dishonor of the note, upon which notice could properly be given and was given to the indorsers.

Exceptions overruled.



GEORGE W. PRENTICE & others, Executors *vs.* LUCY
RICHARDS

The rent of a boarding house kept by a single woman without a family is not a claim for necessities against her, within the *St.* of 1848, c. 304, § 10, which provides that such claims shall not be barred by a discharge in insolvency.

ACTION OF CONTRACT to recover one hundred and twenty five dollars for one quarter's rent of a dwelling-house in Boston. Answer, a certificate of discharge in insolvency. Replication, that this was a "claim for necessities furnished to the defendant and her family," within the meaning of *St.* 1848, c. 304, § 10, and therefore, not having been proved against her estate, not barred by the discharge.

The question at issue was submitted to the decision of the court of common pleas, and, on appeal, to this court, upon the following facts : The defendant for twenty five years has been a widow, with no children and no family, keeping a boarding house as her sole means of support and as a business. She occupied this house during the time sued for, and had a large parlor in it for the boarders, in which she was accustomed to sit with them ; but reserved no room with a fire in it for herself

J. A. Abbott, for the plaintiffs.

G. W. Searle, for the defendant.

SHAW, C. J. The question in this case turns upon the construction of *St.* 1848, c. 304, § 10, being in addition to the insolvent acts. It provides that a discharge in insolvency shall not bar any claim for necessities furnished to the debtor or his family, unless proved.

The word "necessaries" is so general, and of so broad a signification in itself, that it is necessary, in construing it, to consider the subject matter in connection with which it is used. In this statute, it is used as part of the system of insolvency, and it is to be considered in connection with all statutes in *pari materia*.

Three great objects are manifest in the system of insolvent laws ; first, a distribution of all the insolvent's property ; second, an equal distribution of his property amongst all his creditors, when it is insufficient to pay the whole ; and third, to discharge an honest debtor from all prior debts. We speak of the general policy ; of course the laws make some exceptions to the complete accomplishment of each of these objects.

The exception in question, of the discharge of the debtor from debts for necessities, is directly repugnant to the policy of the system in these last two particulars — the equal distribution of the property, and the discharge of the debtor. We think, therefore, it is to be construed strictly, and in reference to the purpose for which it is introduced. This purpose appears to us to be founded on the great principle of humanity, which exempts certain property from attachment, even for a just debt — that which gives effect to the contract of a minor for necessa-

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ries, notwithstanding his general disability to bind himself. It is to save the party from suffering for the want of food, shelter, medicine and the like—wants so imperative that even the claims of strict justice must yield to them. Were it not for this provision, a debtor, poor and in declining credit, might be unable to obtain articles on his own credit, sufficient to save himself, and those dependent upon him, from suffering. These will commonly be such small amounts as the debtor, though his property has all been taken, may discharge by his labor, or from subsequent acquisitions.

Such being, in our view, the object of the enactment, we think it must be strictly limited to amounts necessary to relieve present and urgent personal wants, of the character above mentioned. It is in some respects analogous to the case of minor's contracts for necessities, and to that extent the authority of those cases applies. *Tupper v. Cadwell*, 12 Met. 559. *Mason v. Wright*, 13 Met. 306.

Without attempting to lay down any general rule, precise enough to apply to all cases—which would be difficult, if not impossible—the court are of opinion, that the rent of a house hired by a single woman without family, for the business of keeping a boarding house, is not within the class of necessities intended by this statute. If it were, we see not how it could be distinguished from the bills for butcher's meat, groceries and all other supplies of such a house; and if it could be so considered in regard to a house at five hundred dollars annual rent, why not to a large boarding house, with all its furniture and appliances? The words are not "things necessary to the carrying on of his business," but "necessaries furnished to the debtor, or his family," which we construe to be, necessary to their personal relief, which the rent in question was not. The debt therefore was barred by the discharge.

Judgment for the defendant.

Thayer v. Southwick & another & trustee.

ELIAS B. THAYER vs. GEORGE F. SOUTHWICK & another & Trustee.

A verdict for the plaintiff in an action of tort will not charge the defendant as his trustee in foreign attachment.

TRUSTEE PROCESS. The city of Boston, on whom, as trustee of Southwick, the writ was served on the 29th of April 1854, answered that it had no goods, effects or credits of Southwick in its possession, unless it was chargeable as his trustee upon these facts :

In an action of tort, brought by Southwick against the city in this court, a verdict was rendered in his favor on the 20th of April 1854, for \$12,000 and costs ; on which judgment was rendered on the 8th of May, and on the 9th of May execution was issued thereon, and the judgment paid and satisfied by the city.

G. W. Searle, for the plaintiff.

J. P. Healy, (city solicitor,) for the trustee.

SHAW, C. J. The original cause of action did not render the city liable as trustee, because it is a cause of action arising from tort. The verdict did not convert it into a debt ; no action of debt would lie on it. It could not constitute a debt till judgment should be rendered on it ; and when judgment was rendered on it, it was too late for the city to plead it, or otherwise bring it to the notice of the court. The city owed the principal nothing when the trustee writ was served on them.

Trustee discharged

LORIN W. REED *vs.* ELEAZER FREDERICK.

In an action on a debt from which the debtor has received a certificate of discharge in insolvency, evidence of promises made before the commencement of the proceedings, to pay the debt notwithstanding, are inadmissible; and their admission is ground of exception, although accompanied by evidence of a subsequent promise, and "only for the purpose of showing that the defendant would be likely to make the promise after he went into insolvency, and as showing that he considered it an honorary debt," and although the jury are instructed that "to entitle the plaintiff to recover, they must be satisfied that the defendant, after the commencement of the insolvency proceedings, unconditionally promised the plaintiff to pay his debt."

ACTION OF CONTRACT on a promissory note. Answer, a certificate of discharge in insolvency.

At the trial in the court of common pleas at April term 1855, before *Mellen*, C. J., the plaintiff introduced evidence tending to show that before the defendant filed his petition for the benefit of the insolvent laws, and also while the insolvency proceedings were pending, he told the plaintiff that the proceedings were only intended to affect a certain other note, and that the plaintiff's debt should be paid notwithstanding the discharge; and also that the defendant made similar promises after his discharge.

The defendant objected to the admission of so much of the evidence, as related to representations or promises made before the filing of the petition. But the court admitted the testimony, "only for the purpose of showing that the defendant would be likely to make the promise after he went into insolvency, and as showing that he considered it an honorary debt;" and instructed the jury, "that, to entitle the plaintiff to recover, they must be satisfied by the testimony, that the defendant, after the commencement of the insolvency proceedings, unconditionally promised to pay the plaintiff the amount of the note." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

G. H. Kingsbury, for the defendant.

I. W. Richardson, for the plaintiff. 1. It was competent for the plaintiff to show that this was an honorary debt, (which was

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the sole purpose for which the evidence objected to was admitted,) and that the defendant so regarded it, and intended to pay it notwithstanding he should obtain a discharge. If the defendant, on the eve of his insolvency, promised to pay it, without regard to any discharge, and the plaintiff, relying upon such assurance, did not prove his claim, this case is within *Kingston v. Wharton*, 2 S. & R. 208.

2. The admission of this evidence has been rendered immaterial by the finding of the jury, under the instructions of the court, that the defendant, after his insolvency, made an unconditional promise of payment.

3. The evidence was admissible for the further purpose of defeating the discharge, as obtained by fraudulent means and for fraudulent purposes.

SHAW, C. J. The plaintiff could recover only by proving an express promise after the debtor had obtained his discharge. Proof of a promise before the discharge was not competent for any purpose, and ought not to have been admitted. It is impossible now to say that the jury, in finding their verdict for the plaintiff, did not rest it on the proof of a promise before the discharge was granted; or that there was sufficient evidence of a promise after the discharge to warrant the verdict.

Exceptions sustained.

CORNELIUS CASEY vs. ROBERT P. WIGGIN.

Money paid by a married woman before the 8th of 1855, c. 804, upon a bond to convey land to her, is *prima facie* her husband's property, and may be recovered back by him, on offering to surrender the bond.

ACTION OF CONTRACT for money had and received. The case was submitted to the superior court of Suffolk on the following facts:

On the 20th of January 1855, the defendant executed to "Mary Casey, wife of Cornelius Casey," a deed for the conveyance of certain land in East Boston to her upon the payment by

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her of certain sums of money; and at the same time received from her the first instalment of such purchase money, (which was the money now sue. for,) and gave her a receipt therefor. Said money was in fact taken by the wife from a savings bank in Boston, where it had been deposited by her in her own name. The plaintiff was at that time serving out a sentence in the house of correction, and was ignorant of the transaction between his wife and the defendant, and never received the bond, which was left for record by his wife in the Suffolk registry. The plaintiff's wife, during the negotiations for the estate, and at the time of payment, always declared to the defendant that the money was her own. She has since declared that it was her husband's, left in her hands by him. Neither the plaintiff nor his wife has had possession of the estate. The plaintiff, on the 7th of February 1855, gave notice to the defendant that he disaffirmed the transaction, and that the bond had never been delivered to him, but might be found and received by the defendant at the registry of deeds; and demanded of the defendant the money paid to him by the plaintiff's wife as aforesaid. The defendant refused to comply with this demand, and therefore this action was brought.

The superior court gave judgment for the plaintiff, and the defendant appealed.

J. W. Browne, for the plaintiff.

G. H. Kingsbury, for the defendant. If a man allows his wife to keep money deposits at a bank, in her own name, and under her sole control, such money belongs to her, and she will hold it, if she survives him. *Fisk v. Cushman*, 6 Cush. 23. *Ames v. Chew*, 5 Met. 323. *Phelps v. Phelps*, 20 Pick. 556. Her receipt therefor discharges the bank. *St. 1846, c. 209*. Even if the plaintiff's wife had not her husband's consent to dispose of the money deposited by her, yet if the defendant, not knowing that she had no right to dispose of it, gave her a valuable consideration for it, the plaintiff cannot recover it. *Burnham v. Holt*, 14 N. H. 367. *Messenger v. Clarke*, 5 Exch. 394. *Clarke v. Shee*, Cowp. 200. *Lime Rock Bank v. Plympton*, 17 Pick. 161. The bond given to the plaintiff's wife was a valuable consid

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eration, and the husband's dissent could not invalidate the bond, nor was his assent requisite to give it validity. He has no legal interest in it. If he had died without assenting or dissenting, his wife could have enforced it.

SHAW, C. J. The judgment of the superior court, in favor of the plaintiff, brought before this court by appeal, on the facts agreed, must be affirmed. The defendant knew that the person who paid him the money was a married woman, and wife of the plaintiff. It is so recited in his bond. The money paid to him by the plaintiff's wife, as the law then stood, was *prima facie* the plaintiff's money; and being bound to know the law, it must be assumed that the defendant knew it. The defendant acted on the belief that the wife had the authority of the husband for what she did; had that been so, he would have been safe, but on the proof the fact was otherwise. We cannot distinguish it from the recent cases of *Ames v. Chew*, 5 Met. 320, and *Commonwealth v. Davis*, 9 Cush. 283. The transaction having occurred before the *St.* of 1855, c. 304, it is not affected by the provisions of that act. *Judgment for the plaintiff.*

CHARLES W. WALKER *vs.* JOHN PENNIMAN.

In an action on an agreement to pay a debt contracted by another, the jury were instructed that whether the case was within the statute of frauds depended on the question whether the defendant's contract was new and original, or a mere promise to pay the existing debt of another and collateral; and that if the evidence satisfied them that at the time of the defendant's promise to pay the amount to the plaintiff, it was also agreed that the claim against the original debtor should be cancelled and given up to him, and it was so cancelled and given up in pursuance of such agreement, "it would constitute a good consideration, not within the statute of frauds." *Held*, that the defendant had no ground of exception.

The question whether a verdict is against evidence cannot be raised upon a bill of exceptions.

ACTION OF CONTRACT to recover \$238.25, "which the defendant promised to pay the plaintiff, in consideration that he would enter into his employ in the making and repairing of piano

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fortes." Answer, a denial of the promise; and the statute of frauds.

At the trial in the superior court of Suffolk at January term 1856, before *Huntington, J.*, the plaintiff introduced evidence that before the 8th of September 1853 the defendant had been in the habit of furnishing stock to one Hamblin to make pianofortes, and, when they were finished, advancing the money for the labor, and taking bills of sale of them; that on said 8th of September two pianofortes were finished, and in the depot for sale, and the plaintiff threatened to attach them, or assert a lien for his work upon them, unless a note for \$238.25, then due from Hamblin to him for labor, (with which note and labor the defendant was in no way connected,) was paid; and that it was then agreed between the plaintiff and the defendant, in the presence of Hamblin, that the plaintiff should finish up all the unfinished work for the defendant, and be paid the same prices which the defendant was then paying Hamblin; and the defendant agreed "that if the plaintiff would go on and finish up the instruments, the defendant would pay him the amount of the note," to which the plaintiff consented, and agreed to give up the note and abandon all claim on Hamblin, and afterwards did give up the note.

The bill of exceptions, after reciting this evidence and some testimony introduced by the defendant, stated that "there was other evidence in the case, which the defendant and the plaintiff respectively relied on to maintain the issues raised."

The defendant's counsel, in his closing argument to the jury, contended "that the evidence, as reported, even if the jury believed it to be true, was not sufficient to bind the defendant to pay the note; and that it proved no such consideration between the parties, as would take the case out of the statute of frauds."

The court declined so to rule; and instructed the jury "that whether the case was within the statute of frauds, or not, depended upon whether the contract between the parties was a new and original one, or a mere promise to pay the existing debt of another, and collateral; that giving up some advantage or submitting to some loss would be sufficient to create an

original contract; that it was for them to determine, upon the evidence, what the agreement was between the parties; and that if the evidence satisfied them that the plaintiff, at the time of the alleged contract, agreed to give up his claim against Hamblin, and the defendant promised on his part to pay the amount to the plaintiff, and if it was also at the same time agreed that the due bill should be cancelled and given up to Hamblin, and if it was so cancelled and given up in pursuance of such agreement, it would constitute a good consideration, not within the statute of frauds."

The jury found a verdict for the plaintiff, and the defendant alleged exceptions.

S. C. Maine, for the defendant.

J. Q. A. Griffin, for the plaintiff.

MERRICK, J. The principal, and perhaps the only question, which can be considered as fairly arising upon the bill of exceptions in this case, relates to the instructions given to the jury concerning the statute of frauds, so far as its provisions are applicable to the contract set forth in the declaration, and the evidence by which it was attempted to be proved at the trial. No action can be brought to charge any person upon a mere oral promise, of which no written note or memorandum has been made, to answer for the debt, default or misdoings of another. Rev. Sts. c. 74, § 1. If, therefore, the agreement of the defendant was simply to answer for or to pay the debt which was due from Hamblin to the plaintiff, it was a contract which the provisions of the statute will not permit to be enforced. But if, for a good and sufficient consideration, the defendant assumed and took upon himself the debt which Hamblin had before owed to the plaintiff, and promised to pay it, and Hamblin was thereby, and as a part of the agreement between the parties, released and discharged from all liability upon his note, then the promise of the defendant was a promise to pay his own debt, and not the debt of another person, and an action at law may well be maintained upon it.

The instructions given to the jury appear to us to recognize and to have been framed substantially in accordance with this

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distinction. They are not very plainly or accurately stated in the bill of exceptions; but the import and meaning of them, we think, cannot be mistaken. The jury were, in substance and effect, advised that the sufficiency of the defence depended upon the decision first to be made upon the question whether the promise of the defendant was a mere collateral undertaking to pay the debt of another person, or constituted one part of a new, original and independent contract between the parties; and that if, in pursuance of their mutual agreement, the indebtedness of Hamblin upon his promissory note to the plaintiff was cancelled, released and extinguished, and the defendant, for a good consideration, such as some loss or disadvantage submitted to by the plaintiff therefrom, promised the plaintiff to pay him the amount of said note, this would be a contract not within or affected by the statute of frauds. The precise language of the presiding judge was, that it would be "a good consideration, not within the statute;" but considering the connection in which that word is used, and the explanation of which it is a part, it is obvious that he was defining what he had just before spoken of as a new and original contract. Taking this view of the instructions, we think the law was properly stated and explained to the jury, and that there is no ground for the exceptions taken by the defendant.

It has been urged further, as a cause for setting aside the verdict, that there is a substantial variance between the allegation in the declaration, and the evidence given upon the trial in support of it; that the contract set forth in the declaration is absolute in its terms, while that which was proved was conditional. This is substantially a motion to this court to interpose and set aside the verdict because the verdict is against the evidence, a course of proceeding which is not admissible upon a bill of exceptions. Exceptions are to be allowed whenever a party is aggrieved by any opinion, direction or judgment of the court in matter of law; but not when he conceives that the jury have misapplied or have erroneously given an unjust or inadmissible effect to the evidence. Rev. Sts. c. 82, § 12.

There are other answers, however, to this objection, which, if

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it were necessary to resort to them, would seem to be quite decisive against it. The whole evidence which was submitted to the jury is not now before this court; for the bill of exceptions, after reciting a portion, and, it may be, the least material part, of that which was introduced upon the trial, adds, that "there was other evidence in the case, which the defendant and plaintiff respectively relied on to maintain the issues raised." It is impossible, therefore, for the court here to see that the jury erroneously found that the allegations of the declaration were proved by the evidence laid before them; it does not possess all the means which are indispensable to the formation of an opinion upon the subject. But further, in looking at the part of the evidence which is reported, it appears to us to have a very strong tendency to establish the proposition which the plaintiff attempted to maintain; and we are not prepared to say that it was not fully sufficient to support it. *Exceptions overruled.*

SARAH HARLOW vs. FITCHBURG RAILROAD COMPANY.

The provision of St. 1851, c. 147, § 5, that in any action "brought by a passenger against any railroad corporation, steamboat proprietor or other common carrier," the plaintiff, after proof of the bailment of his trunk to the defendants, and of its loss "by the fault of such carrier, or of the agents of such carrier," shall be allowed to put in evidence a descriptive list of its contents, sworn to by himself, applies to the case of the loss of a trunk left by the passenger with the baggage master of a railroad corporation, after arriving at his place of destination.

ACTION OF TORT against a railroad corporation for the loss of a trunk entrusted to them as common carriers.

At the trial in the superior court of Suffolk at January term 1856, before *Abbott, J.*, it appeared that the defendants were the owners of a railroad in this commonwealth, and common carriers of passengers thereon; that the plaintiff, having purchased a ticket of them, was a passenger in their cars from Boston to Waltham, with her trunk; that upon her arrival at Waltham she asked the conductor of the train to take charge of her bag-

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gage, saying that she would send for it as soon as she had secured a boarding-place; to which the conductor assented, and directed the defendants' baggage master to take charge of it, which he did; but a day or two after, it was stolen from their custody, and on the next day, when the plaintiff sent for it, could not be found, and had not been found since.

The plaintiff then offered a schedule of the contents of the trunk, supported by her own oath, which was objected to by the defendants, but admitted by the court. The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

H. C. Hutchins, for the defendants. This evidence was inadmissible, unless allowed by the *St.* of 1851, c. 147, § 5. *Snow v. Eastern Railroad*, 12 Met. 44. The plaintiff had arrived at her journey's end, and received her trunk, and deposited it with the baggage master; the relation of the defendants to the plaintiff as common carriers had ceased, and that of warehousemen had supervened. *Thomas v. Boston & Providence Railroad*, 10 Met. 472. *Norway Plains Co. v. Boston & Maine Railroad*, 1 Gray, 263. The *St.* of 1851, c. 147, § 5, does not extend to actions against warehousemen; but applies only "whenever an action shall be brought by a passenger against any railroad corporation, steamboat proprietor or other common carrier," for the loss of baggage "by the fault of such carrier, or of the agents of such carrier" — showing that the statute is limited to the relation of common carrier and passenger. If it is only necessary to show that a plaintiff has been a passenger, in order to make his testimony admissible under this statute, when does the rule cease to be applicable? The common carrier is a public servant, to whom the plaintiff must entrust his baggage when he travels; but a bailment, after the arrival, is the traveller's own voluntary act.

J. M. Bell, for the plaintiff.

SHAW, C. J. The main question made at the trial, and the only one now argued here is, whether the case was within the *St.* of 1851, c. 147, respecting the carrying of effects of passengers by railroad corporations, steamboat proprietors and other common carriers, and especially section 5 of said statute

which provides, that after proof of the bailment of any trunk, &c., and the subsequent loss thereof by such carrier, the plaintiff may put in evidence his own schedule or written descriptive statement of the contents of such trunk. The argument was, that because the transit of the passenger and that of her baggage had terminated, the relation of passenger and common carrier between the parties had ceased, and therefore the cause was not within this statute.

We lay no great stress on the facts, that on arrival of the train at Waltham the plaintiff requested the conductor to take charge of her luggage until she could send for it; that the conductor consented to do so, and directed the baggage master of the defendants to take charge of it. But this evidence was competent, and has a tendency to show that the plaintiff did not at that time take possession of her trunk, or intend to do so, but intended to leave it temporarily at the depot; that the proper officers and servants of the company had notice of it, and did in fact take the trunk to the baggage room, the proper place of deposit for that purpose. What we mean is, that we do not consider that this request to the conductor and baggage master, and their assent to it, were the basis of the obligation of the company.

We are then to inquire what was the duty of the defendant company, as carriers of passengers; and what is the ground on which it rests. The purchase of a ticket must be regarded, in law, as compensation for all the duties which the carriers undertake to perform, in respect to the person of the passenger, and in respect to the care and transportation of his baggage. When therefore the baggage of a passenger is placed in their custody, to be carried with the passenger, they are bailees for hire, paid agents and depositaries, and their responsibility is to be tested accordingly. Now, whether a common carrier of passengers, in respect to the baggage of a passenger, is like a common carrier of merchandise, liable for all losses except those caused by an act of God or a public enemy, and whether or not that larger responsibility terminates when the transit ends and the goods are unladen—which it is not necessary to decide—all responsi

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bility of the carriers does not then cease. They, the same company, in virtue of the same duty, and upon the same pecuniary consideration, are bound, both by the rules of the common law, as a necessary incident to their undertaking, and by the obligations imposed upon them by the *St.* of 1851, to keep the property safely, and deliver it to the owner on request. Then, as bailees for hire, they are bound to use due and reasonable care and diligence in keeping the property, such reasonable care and diligence as the nature of the property may require to preserve it from loss and damage, such as a person of common prudence would exercise in the care and preservation of his own property of a similar kind in like circumstances.

And the court are of opinion that this was a case within the statute, so as to make the evidence of a descriptive list, sworn to by the plaintiff, competent evidence. The statute makes no distinction, if there be one, between the larger liability of carriers whilst the baggage is *in transitu* and before they are unladen from the cars, and that more limited duty which devolves on them as bailees for hire, after it is received at the depot. The provision is, that whenever an action shall be brought by a passenger against any railroad corporation, &c., to recover damage for any trunk, &c. lost or damaged, and the plaintiff shall have made proof of the bailment, &c., and the loss of the same, by the fault of such carrier or his agents, the plaintiff shall be allowed to put in evidence a descriptive list sworn to by him, &c.

Whatever may be the nature and extent of the duties of carriers, whether they be liable for all losses, or only for such as proceed from negligence and carelessness of them or their agents, or from failure in the performance of all duties incumbent on all bailees for hire, the relation of passenger and carrier, in regard to baggage, continues until the carriers have performed their whole duty. The same reasons, therefore, for admitting the sworn descriptive list, to prove the contents of a lost trunk, apply to all cases in which the company may be responsible.

Exceptions overruled.

EDWARD RIDDLE vs. DANIEL J. COBURN.

An auctioneer, who had guaranteed his sales, sold and delivered a chattel upon condition that the title should not pass until payment of the price; and upon the purchaser's failing to perform the condition, agreed with him to take the chattel, and settled with the seller of the chattel, after informing him of the facts. *Held*, that the auctioneer thereby acquired a perfect title, and might maintain trover against one claiming title by sale from such purchaser.

ACTION OF TORT against a deputy sheriff for the conversion of a carriage. Answer, a denial of the plaintiff's property.

At the trial in the court of common pleas at April term 1855, before *Mellen*, C. J., the evidence for the plaintiff proved that he was an auctioneer, and as such, on the 18th of March 1854, sold by public auction this carriage and others, belonging to Whittier, under an agreement that he should, as was his custom, guaranty to Whittier all the sales; that this carriage and others were bid off by Worcester; that the conditions of the sale were cash or indorsed notes satisfactory to the plaintiff; that Worcester failed to comply with these conditions, and the plaintiff, on the 20th of March, agreed in writing with Worcester that the latter should take the carriages which he had bid off, and store them for the plaintiff, and Worcester took them accordingly; and that the defendant, without the plaintiff's license, took the carriage from Worcester's stable.

There was also evidence that on the 14th of April 1854 the plaintiff settled with Whittier for all the carriages sold, having first informed Whittier that he bought the carriages bid off by Worcester; and that the defendant afterwards took this carriage on a writ of replevin in favor of one claiming under a sale made by Worcester on the 23d of March.

Upon the foregoing evidence, the defendant requested the judge to rule "that the plaintiff could not acquire a title to the carriage in question under a sale by himself as auctioneer, nor sell upon a condition, upon the failure of which the property should become his own, although he guaranteed all the sales; and that the defendant, claiming under a subsequent purchase from Worcester, had a right to hold the alleged transfer of

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title to the plaintiff as void; and so the plaintiff could not maintain this action."

But the judge refused so to rule; and instructed the jury "that if they were satisfied that the sale was made to Worcester on a condition precedent, and that the delivery was on such condition; and that the condition was not complied with; and that the plaintiff had not in any way waived that condition; but that the carriage was delivered to Worcester on storage by the plaintiff, and for him, then the property did not pass to Worcester; and if the plaintiff, in pursuance of an agreement with Whittier before the sale, guarantied the sales, and afterwards settled with Whittier for the carriages as sold, he might maintain the present action." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

B. F. Jacobs, for the defendant.

S. J. Thomas, for the plaintiff.

SHAW, C. J. The jury having found that the sale to Worcester was upon a condition which was never complied with, and that the delivery of the property was not made in pursuance of the sale, but for another special purpose, no property in the carriage ever passed to Worcester. But the plaintiff, under his agreement with Whittier to sell the carriage and guaranty the sale, had a special property in the carriage, good as against everybody but Whittier, with a good authority from him until revoked. When, after the sale, Whittier, so far from revoking the authority, insisted on his contract of guaranty, he affirmed the sale to Worcester, at the price at which Worcester bid off the carriage. The effect of the guaranty by the auctioneer was to stand in the place of the purchaser if required, to pay the price and receive the article in his place. The call of the owner upon the auctioneer to make good his guaranty was to require him to pay the price, upon payment of which the owner, by necessary legal implication, agreed that the carriage should be his; and it being already in his possession, this was a complete sale, and passed the property to him, as it would have done to Worcester, the purchaser, by force of the sale, had he complied with the condition and paid the price. The title of the plaintiff was then absolute.

Exceptions overruled.

HENRY PLUMMER *vs.* EDWARD J. GRAY.

An action on the Rev. Sts. c. 50, § 12, to recover back money lost at gaming, cannot be maintained by the loser after the expiration of three months from the loss.

ACTION OF CONTRACT by a loser of money at gaming, on the Rev. Sts. c. 50, § 12, which provide that any "person, losing money at gaming and paying it to the winner, may sue for and recover such money, in an action for money had and received to the use of the plaintiff, or he may bring a special action on the case therefor; and if the person, so losing said money, shall not, within three months after such loss, without coercion or collusion, prosecute with effect for such money, it shall be lawful for any other person to sue for and recover treble the value of such money, with full costs of suit, in an action of debt, the one moiety to the use of the person so prosecuting, and the other moiety to the use of the Commonwealth."

At the trial in the superior court of Suffolk at January term 1856, *Abbott, J.* ruled that this action could not be maintained, because it was not commenced until more than three months after the money was lost by the plaintiff and won by the defendant. A verdict was taken for the defendant, and the plaintiff alleged exceptions.

W. L. Burt, for the plaintiff.

No counsel appeared for the defendant.

SHAW, C. J. The Rev. Sts. c. 50, § 12, differ from the previous *St.* of 1785, c. 58, in not expressly limiting the right of action of the loser to three months; but we are of opinion that such a limitation must be implied from the other provisions of the section.

The Rev. Sts. c. 50, § 12, give a right of action to the loser exclusively for his own benefit, and time enough to bring it but if he does not, then a right is given to the person who may sue *qui tam*, to recover three times the amount lost, one half to his own use, and one half to the use of the Commonwealth—a right utterly inconsistent with that of the loser. The loser has

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no right at common law to recover back of the winner the money lost at gaming; the statute is an enabling act, and the proceedings of the plaintiff must follow it strictly. After three months, the right of action is vested in other persons, to other uses; and not being concurrent, the right of action of the loser is by necessary implication divested. *Exceptions overruled.*

EDWIN L. SHED vs. DANIEL W. TILESTON & another.

In a notice to the judgment creditor of the intention of a debtor, committed on execution, to take the poor debtors' oath, a description of the execution as issued from the court of common pleas holden at Lowell in the county of Middlesex, when in fact it was issued from that court holden at Boston in the county of Suffolk, is such a variance as avoids the discharge of the debtor, and makes liable the sureties upon his bond for the prison limits, if he goes beyond those limits.

ACTION OF CONTRACT on a bond for the liberty of the prison limits. Answer, a discharge upon taking the poor debtors' oath.

At the trial in the superior court of Suffolk at November term 1855, it appeared that the citation to the plaintiff stated accurately the names of the plaintiff, of the debtor, and of the jailer who made the application in his behalf, the time and place of hearing, and the amount of the debt and costs on which the debtor was committed, except \$2.35 costs of commitment, which were omitted in the citation; and described the execution upon which he was committed as "issued from the court of common pleas holden at Lowell within and for the county of Middlesex," when it was in fact issued from that court holden at Boston within and for the county of Suffolk. It was also in evidence that the plaintiff did not appear at the time and places named in the citation, and that the debtor took the oath and received his discharge; and afterwards, within ninety days from his commitment, went without the jail limits; and did not surrender himself according to the bond. *Huntington, J.* ruled that the citation was insufficient, and the discharge

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invalid. A verdict was taken for the plaintiff, and the defendant alleged exceptions.

J. C. Park, for the defendant, cited *Bussey v. Briggs*, 2 Met. 134; *Collins v. Douglass*, 1 Gray, 167; *Conkey v. Kingman*, 24 Pick. 119.

B. Dean, for the plaintiff, cited *Putnam v. Longley*, 11 Pick. 487; *Slasson v. Brown*, 20 Pick. 436; *Collins v. Douglass*, 1 Gray, 170; *Young v. Capen*, 7 Met. 287; *Niles v. Hancock*, 3 Met. 568.

DEWEY, J. The discharge of poor debtors committed on execution for debt has been uniformly held by this court to be open to all legal objections to the regularity of the preliminary proceedings. Hence a defective notice has always been held fatal to the validity of the discharge. There may have been some relaxation in the application of the rule, but the principle has always been adhered to. Though no precise form of notice is required, yet it must substantially state the case in reference to which the party is summoned to show cause why the poor debtors' oath should not be administered. In the case before us, there was a substantial misrecital of the demand upon which the debtor was committed, and from which he contends he was discharged by virtue of the proceedings before the magistrate. The notice to the plaintiff was, that the debtor having been committed "on an execution issued from the court of common pleas at Lowell within and for the county of Middlesex," was desirous to take the oath prescribed by law for the relief of poor debtors; whereas the plaintiff's execution, upon which the debtor was committed, issued from the court of common pleas holden at Boston within and for the county of Suffolk. This was a misdescription, and substantially variant from the real execution upon which he was committed; and the notice was therefore insufficient to authorize the administration of the poor debtors' oath, and the discharge of the debtor. The defence relied upon cannot avail the parties to the prison bond, and judgment must therefore be entered upon the verdict for the plaintiff.

Exceptions overruled.

JOHN L. PLUMMER vs. GEORGE ODIORNE & another.

The condition of a bond for the liberty of the prison limits is satisfied by the debtor's being admitted to take the poor debtors' oath on the ninety-first day from the date of the bond, without any surrender to the jailer either on or before that day.

ACTION OF CONTRACT on a bond for the liberty of the prison limits, executed by George Odiorne as principal, and the other defendant as surety, and conditioned, as required by the Rev. Sts. c. 97, § 63, that Odiorne (who had been, on the day of the date of the bond, committed to jail on an execution obtained at the plaintiff's suit) should surrender himself to the jailer at the expiration of ninety days from its date, to be held in close confinement, if not sooner discharged by payment of the execution or by order of law.

At the trial in the superior court of Suffolk at January term 1856, it appeared that Odiorne was admitted to take the poor debtors' oath in due form on the ninety-first day after the day of the date of the bond; and never at any time surrendered himself to be held in close confinement. *Abbott, J.* ruled that the defendants were held. The defendants thereupon submitted to a verdict for the plaintiff, and alleged exceptions.

I. Story, for the defendants.

B. Dean, for the plaintiff.

DEWEY, J. The case of *Wiggin v. Peters*, 1 Met. 129, has settled the construction of the Rev. Sts. c. 97, §§ 63, 64, as to the time in which the debtor may surrender himself and save his bond given for securing the enjoyment of the liberty of the prison limits. It was there held, that such bond was not broken, if the debtor, at any time during the ninety-first day after the day of his commitment, surrendered himself to the jailer to be held in close confinement. This was held necessarily to result from the fact that he had the entire ninety days to discharge the execution by payment or otherwise, and therefore no duty devolved upon him of making the surrender of himself to the jailer until the ninety-first day.

It is said, however, that although this be so, yet if the debt be not discharged in some form on the ninetieth day, there must be a surrender on the ninety-first at the jail, and that nothing occurring after the ninetieth day can excuse or justify such omission of the debtor to surrender himself.

But, as it seems to us, if the proper construction of the statute be that the debtor has the right to make the surrender during the entire ninety-first day, it must necessarily follow that, if the execution has been discharged by payment, or discharge of the same by taking the poor debtors' oath before the expiration of the time within which the debtor is required to surrender himself to the jailer, there can be no breach of the bond in not surrendering himself after he has thus been discharged. He is required to surrender himself to the jailer "to be held in close confinement." But that cannot be required when no lawful authority exists on the part of the jailer to hold the party in close confinement. The purpose of the surrender required on the ninety-first day no longer exists. The party cannot be kept in close confinement after filing with the jailer the certificate of his discharge, by having taken the poor debtors' oath. The surrender in such case would be the merest form, resulting in nothing, for the same moment the surrender is made the jailer must discharge the prisoner from his custody and from all confinement in prison.

It results from this view of the case that if, at any time before the expiration of the time in which the party is required to surrender himself, he is legally discharged from all imprisonment, and not liable to close confinement on the execution on which he was originally committed, no action can be maintained upon his prison bond for his not surrendering himself to the jailer to be held in close confinement. In the present case the debtor having, in pursuance of proper previous proceedings, been discharged at ten in the morning on the ninety-first day after his commitment, and the certificate thereof having been duly filed with the jailer on the same day, there was no duty devolving upon the debtor to surrender himself after such filing of the certificate with the jailer; and no action therefore accrues

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to the creditor upon his prison bond by reason of his omission to surrender himself under such circumstances.

Exceptions sustained.

JETHRO H. RICKER vs. LEONARD R. CUTTER.

A written contract to build a brick dwelling-house, "of the same depth back from the street, and of equal quality, both as to materials and finish, with F.'s house" on the adjoining lot, obliges the contractor to build a wooden shed or kitchen in the rear, if there is such an erection behind F.'s house.

The submission of the construction of a written contract to the jury is no ground of exception, if they decide it aright.

ACTION OF CONTRACT on a bond, which recited that Henry Sperry had contracted with the defendant, by indenture of even date therewith, to build for the defendant on the defendant's land on Grove Street, in Boston, "and adjoining a house now owned by John Fisk, two brick dwelling-houses; both of said houses to be of same depth back from the street with said Fisk's house, and each to be of one half of the width of said Cutter's lot of land aforesaid; and said Sperry is to build each of said houses of equal quality, both as to materials and finish, with said Fisk's house;" and was conditioned that the defendant should convey said lot to the plaintiff "when said houses are completed."

At the trial in the superior court of Suffolk at November term 1855, it was admitted that at the time of the execution of the contract and bond there was, in the rear of Fisk's house, a wooden shed or kitchen, in dimensions about twelve feet by ten; and that no such sheds or kitchens had been built upon either of the defendant's houses.

The plaintiff requested the court to rule that whether sheds were to be built under the contract, was a question of law and not of fact; that by the contract no sheds were required to be built, and the failure to build them constituted no defence.

Nelson, C. J. declined so to rule, and instructed the jury "that

although the contract did not, in so many words, mention the erection of sheds or kitchens as parts of the two dwelling-houses, yet they must be satisfied that the plaintiff had complied with the fair meaning of the words of the contract; that those words were to be interpreted by the jury according to their common signification, illustrated by the circumstances under which they were used by the parties; and the jury would therefore inquire and find whether the two brick dwelling-houses had been completed."

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

S. J. Gordon, for the plaintiff.

J. Q. A. Griffin, for the defendant.

BIGELOW, J. The judge erred in submitting to the jury the question whether, by the terms of the contract under which the houses were to be erected for the plaintiff, the defendant was required to build the sheds. This was clearly a question of law, to be determined on the true construction of the written contract, and it was the exclusive province of the court to interpret the agreement, and to give to the jury suitable instructions as to its meaning. *Hutchison v. Bowker*, 5 M. & W. 535. But this error is no ground for setting aside the verdict, because it is clear that the jury have put on the clause of the contract in question a correct construction, such as the court should have given, and have found their verdict accordingly. *Doe v. Strickland*, 8 C. B. 724. *Emerson v. Cogswell*, 16 Maine, 77. *Hathaway v. Crosby*, 17 Maine, 448. The sheds or kitchens were part of the house, which the plaintiff was bound to erect before he could claim of the defendant a conveyance of the land.

Exceptions overruled.

Harwood & another v. Mulry.

JESSE HARWOOD & another vs. MICHAEL MULRY.

In an action by two partners for goods sold and delivered, after the introduction of their book of original entries, kept by one partner, with his suppletory oath that he made the entries, and delivered the goods to his copartner to be delivered to the defendant, the other partner may testify that he did deliver the goods to the defendant.

ACTION OF CONTRACT for goods sold and delivered. At the trial in the superior court of Suffolk at January term 1856, before *Abbott, J.*, it appeared that the plaintiffs were copartners. One of them produced the plaintiffs' book of original entries, and testified that the goods sued for were charged therein by himself to the defendant at the dates there written, and that they were taken at those times from their shop by his partner to be delivered to the defendant, who was not present at such times.

The other plaintiff was then called and sworn, and asked whether he did not deliver to the defendant the goods charged by his partner. This question was objected to. The court sustained the objection, "it not appearing that the witness had ever made any memorandum or charge of the goods in question;" and ruled that the testimony introduced was not sufficient to prove the delivery of the goods sued for, and would not warrant a verdict for the plaintiffs.

The plaintiffs thereupon submitted to a verdict for the defendant, and alleged exceptions.

A. B. Davis, for the plaintiffs.

J. W. May, for the defendant.

DEWEY, J. The admission of the account books of the party, accompanied by his suppletory oath, as competent evidence, was a departure from the ordinary rule excluding the testimony of a party in his own favor. The extent to which such evidence was admissible has not been marked with entire uniformity in the different states of the Union, but each has adopted its own system. Hence, in deciding upon the question raised by the present bill of exceptions, we must be gov-

erned rather by our own decisions, than by those of other tribunals. A reference to a few of the cases will, we think, sufficiently indicate the principles applicable to a case like the present.

The ancient rule, that the book prescribed must be the original entry of the charges, has not required the rejection of the book because the first actual entry was upon a slate, and afterwards transferred therefrom, the course of business and the convenience of making the charges in the particular case requiring this; and such book, though copied from a slate, was held admissible, and properly introduced with the accompanying oath of the party, in the case of *Faxon v. Hollis*, 13 Mass. 427. So also where the original entries were on a butcher's cart, and were transferred to the day book of the party, the book was held admissible. *Smith v. Sanford*, 12 Pick. 139.

In the case of work done by the servants of a painter, who sent his men to service in painting for the defendant, and the servants brought home memoranda of the items of services, and of the quantity of paint furnished, and from these memoranda the party made his charges on his book, it was held, that the book was admissible, the servants also testifying that they did bring home and deliver to the plaintiff such memoranda. *Morris v. Briggs*, 3 Cush. 342.

It has not been uniformly held that the party who personally made the entry on the book should be the same individual that delivered the goods; as in the case of *Littlefield v. Rice*, 10 Met. 287, where the entry on the books was in the handwriting of the plaintiff's wife, and without any knowledge of the delivery of the goods, except as informed by the husband, by whose direction the entry was made.

The decided cases have also sanctioned the rule that where there is more than one individual connected with the sale and delivery of the goods, and the making of the charges on the book, it is proper to introduce as witnesses all those persons who are thus connected with the transaction, and whose testimony is necessary to establish those facts which would be required to be proved by a single person, when such person had been the

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sole actor, as vendor and bookkeeper. Thus in the case of *Sanford v. Smith*, just cited, where one of two copartners sold and delivered the articles, and charged them on the butcher's cart, and the other partner transferred the charges to the book, the latter was allowed to testify to the charges on the book, and to state that he copied them from the memoranda on the cart, but had no knowledge of the delivery, and the other partner was allowed to testify that he delivered the articles and made the charges on the cart, and upon the evidence of the two persons the book was held to be admissible.

In the case of *Littlefield v. Rice*, above cited, the wife, as already stated, made the charges on the book, but knew nothing of the sale or delivery; but her husband was allowed to testify that he sold and delivered the same, and directed his wife to make the entry; and the book was admitted, the necessary preliminary evidence being thus furnished by the testimony of the two witnesses, although neither alone would have been sufficient. This, like the case before us, was a case where the charges on the book were made by a person who did not deliver the articles, and the oath of the person who did deliver them was also admitted.

In *Barker v. Haskell*, 9 Cush. 218, which was a case of original entry being made upon a slate, and the charges transferred to a day book, as the party who charged the same on the book offered in evidence could not testify to the delivery of the articles, having no further knowledge than that he found the same on the slate, the other plaintiff was allowed to testify that he delivered the same, and charged the articles on the slate.

Looking at the ground upon which this species of evidence was originally held admissible—the necessity of the case in reference to that class of debts that are properly the subject of book charges—we are of opinion that, where there are two copartners, and one delivers the goods, and the other makes the entries upon the book, a very usual course of business, the oaths of the two may be properly introduced, and the book, with such evidence, may be admissible to the jury.

Nor is it any sufficient ground for rejecting the evidence of the party making the delivery, that he made no memorandum or charge of the goods in question. It is true that in the cases of *Morris v. Briggs* and *Barker v. Haskell*, such a memorandum had been made by the party who was called to prove the delivery, but those entries were not preserved, or produced on trial to corroborate the testimony. The fact of such delivery of goods was the point of inquiry of the party or agent who had made the delivery or performed the services charged.

In a case like that of a sale from a butcher's cart, there will be some memorandum kept by the party delivering, because the sale and delivery are wholly through the driver of the cart. But it will not be so where goods are sold at a shop, and delivered at some other place, or sent to the vendee's residence or place of business, by the vendor. The only charge, in such case, would usually be that on the book, and the proof of delivery to the party, if required, must be from some other source.

In the case of *Kent v. Garvin*, 1 Gray, 148, the book was held incompetent, inasmuch as the delivery was by a drayman, from whose delivery book the charges on the plaintiff's book were copied, and such drayman not being produced as a witness, the book was for that cause rejected. In the present case both the witness who made the charge on the book, and the one who delivered the goods, are produced to testify to those facts in which each participated. This obviates the objection that existed in the case of *Kent v. Garvin*.

Exceptions sustained.

Merriam & another v. Granite Bank.

OTIS W. MERRIAM & another vs. THE PRESIDENT, DIRECTORS
AND COMPANY OF THE GRANITE BANK.

A promissory note, indorsed in blank, was accidentally left, by the owner, in a broker's office, and the broker, without himself indorsing it, deposited it in a bank to whom he was indebted for money lent, payable on demand, and to whom he was accustomed to give, as collateral security for such loans, his own memorandum checks payable on demand, or indorsed notes. *Held*, that the bank could not hold the note as against the rightful owner, without showing that they took it in the usual course of business, or as security for a specific debt.

REPLEVIN of a promissory note for \$1,408.05, dated May 3d 1854, signed by Brett & Company, payable to their own order in six months, and indorsed by them and by the plaintiffs. Writ dated November 3d 1854. Answer, property in the defendants, and that the defendants took the note so indorsed, before it was due, in the regular course of their business, and for a valuable consideration. Trial in this court before *Merrick, J.*, who made this report thereof:

"It appeared that the plaintiffs were furniture dealers in the city of Boston; that they received from Brett & Company the note in question, in payment for certain parcels of furniture sold to them; that the plaintiffs, being thus the owners and having possession of the note, put the same, about the 1st of July 1854, into the hands of Weston, one of their clerks, to be deposited by him for them in the Exchange Bank in Boston, for collection; that Weston, having received the note for that purpose, started to go to the Exchange Bank; but having business in his way there at the office of Willis & Company, who were then doing business as brokers in State Street, he first stopped at that place, and transacted certain business with them, and, while there, accidentally placed the note on their counter, and afterwards went away, leaving it there. He then went to the Exchange Bank, and from thence returned to the plaintiffs' place of business. He there first discovered, upon reflecting upon what he had done, that he had not deposited the note in the bank, and supposed that he had by mistake left it at the

office of Willis & Company. Soon after this he started to go there to make inquiries about it, and on his way met Davis, one of the partners of the firm of Willis & Company, and was told by him that he had found the note on the counter and had taken care of it, and would deliver it to Weston whenever he should call for it. In a day or two afterwards Weston called at the office for the note; but Davis, being busy, could not then lay his hand upon it, and requested Weston to call for it on another day. The firm of Willis & Company failed soon after this, namely, on Saturday, the 8th of July. On the Monday following, Weston called again for the note, but did not obtain it. Davis testified that after he found the note, and after Weston called for it the first time, he (Davis) put the note in a wrapper, and wrote the plaintiffs' name upon it.

“ Very soon after the failure of Willis & Company, the plaintiffs learnt that in some way the note had been passed over to the Granite Bank. There was no evidence offered by either party, showing the precise time or purpose for which the note was passed to the Granite Bank, or by whom it was done. But it did appear, upon the examination of the books and papers of the bank, on or about the 25th of July 1854, by Alpheus Hardy, who succeeded Henry M. Holbrook as president of the bank, that Willis & Company were then indebted to the bank for what was called a demand loan, in the sum of twenty six thousand dollars, for which sum the bank held several memorandum checks of Willis & Company, and that the bank then also had, in a trunk in the bank, in which the collateral notes and securities for demand loans were usually kept, a package of notes, amongst which was the note in controversy, inclosed in a wrapper labelled or indorsed in a way to indicate that the notes were held as collateral security for the indebtedness of Willis & Company on their demand loan.

“ Holbrook, the former president of the bank, being called as a witness for the defendants, testified that he was president of the bank from February 1852 to the time of the failure of Willis & Company on the 8th of July 1854; that during the whole of that time he had made demand loans for the bank to Willis

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& Company, taking, whenever he made such loans, the memorandum checks of Willis & Company, payable on demand, and indorsed promissory notes, passed by Willis & Company to the bank as collateral security for the same; that he was well acquainted with Willis & Company and with their manner of doing business; and that from such knowledge of Willis & Company and of their business, and also from what Willis frequently told him at the times when the demand loans were made, he always supposed that the said indorsed promissory notes, which Willis & Company thus passed over to the Granite Bank as collateral security, were not notes which they had discounted or purchased and paid for in full, but were notes on which Willis & Company had made partial advances, and which they held as collateral security for the loans so by them advanced on those notes severally; and that he also supposed that under such circumstances Willis & Company had a right to transfer and assign those notes to the bank as collateral security for the indebtedness by them incurred on demand loans to them by the bank, and that the bank had a right to receive and hold such notes for that purpose.

“Holbrook had no recollection of the particular note now in question, nor of any transaction by virtue of which the bank acquired possession of it; but from the place where it was found on the files, he had no doubt but that it was received as collateral security for a loan when made.

“It was conceded that Willis & Company never made any advances upon this note, or in any way acquired any title to it; and that the plaintiffs never themselves, or by any agent of theirs, sold, assigned or transferred it, or any interest in it, to anybody.

“Upon the foregoing facts and circumstances, the court having intimated to the counsel that the court would instruct the jury, that if the bank took the said note from Willis & Company as collateral security for their indebtedness on the demand loan made to them; and if the circumstances under which they took it were not in the usual course of business, but were of such a suspicious character as to cast a shade upon the transac-

tion, and necessarily to put them on inquiry as to the right of Willis & Company to the note, and their right to sell, dispose of and pledge it; the bank, having so received it, could not maintain their title to the note against the plaintiffs, who were the true and lawful owners of it; and further, that the facts testified of, as before recited, by Holbrook, were in themselves sufficient so to put the bank upon its guard, and upon the inquiry aforesaid; it was thereupon agreed that a verdict should be taken for the plaintiffs, and the proposed instructions should be reserved for the consideration of the whole court; and that if, in the opinion of the whole court, the proposed instructions were correct, and such as were proper to have been given to the jury, then judgment should be rendered for the plaintiffs on the verdict; otherwise, it should be set aside, and a new trial ordered. A verdict was thereupon accordingly taken for the plaintiffs."

C. T. Russell, for the defendants. The defendants received this negotiable note before it was due, duly indorsed, and in the ordinary course of business, and were therefore entitled to hold it against all parties, although it was transferred to them as security for past or present indebtedness. *Wheeler v. Guild*, 20 Pick. 545. *Blanchard v. Stevens*, 3 Cush. 162. If the defendants' president acted without due care, still such negligence, unless so gross as to amount to bad faith, does not affect the defendants' title. *Miller v. Race*, 1 Bur. 452. *Lawson v. Weston*, 4 Esp. R. 56. *King v. Milsom*, 2 Campb. 5. *Gill v. Cubitt*, 3 B. & C. 466. *Beckwith v. Corral*, 2 Car. & P. 261. *Crook v. Jadis*, 5 B. & Ad. 909. *Backhouse v. Harrison*, 5 B. & Ad. 1098. *Foster v. Pearson*, 1 C., M. & R. 849. *Goodman v. Harvey*, 4 Ad. & El. 870. *Uther v. Rich*, 2 P. & Dav. 579. *Raphael v. Bank of England*, 17 C. B. 161. *Carlton v. Ireland*, 5 El. & Bl. 765. *Bank of Bengal v. Macleod*, 7 Moore P. C. 35. *Bank of Bengal v. Fagan*, 7 Moore P. C. 61, 76. *Ayer v. Hutchins*, 4 Mass. 370. *Thurston v. McKown*, 6 Mass. 428. *Jarvis v. Rogers*, 13 Mass. 105. *Cone v. Baldwin*, 12 Pick. 545. *Goddard v. Lyman*, 14 Pick. 268. *Wheeler v. Guild*, 20 Pick. 545. *Whiton v. Old Colony Ins. Co.* 2 Met. 6. *Mechanics' Bank v.*

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Merchants' Bank, 6 Met. 13. *Stoddard v. Kimball*, 4 Cush. 604, and 6 Cush. 469. *Swift v. Tyson*, 16 Pet. 14. *Stalker v. McDonald*, 6 Hill, 93. *Youngs v. Lee*, 18 Barb. 187. *Gwyn v. Lee*, 1 Maryland Ch. 445. *Greneaux v. Wheeler*, 6 Tex. 515. *Matthews v. Poythress*, 4 Georgia, 287. *Beltzhoover v. Blackstock*, 3 Watts, 20. *Bisbing v. Graham*, 14 Penn. State R. 14. *Sandford v. Norton*, 14 Verm. 228. *Atkinson v. Brooks*, 26 Verm. 569. *Tarbell v. Sturtevant*, 26 Verm. 513.

The ruling in this case assumes that Willis & Company had no right to pledge notes pledged to them; which may be questioned. 1 Parsons on Con. 600. Story on Bailments, § 332. *Collins v. Martin*, 1 Bos. & Pul. 648. *Jarvis v. Rogers*, 13 Mass. 105. *Tarbell v. Sturtevant*, 26 Verm. 513.

H. F. Durant, for the plaintiffs, cited *Cone v. Baldwin*, 12 Pick. 546; *Thompson v. Hale*, 6 Pick. 262; *Gill v. Cubitt*, 3 B. & C. 466; *Union Bank v. Knapp*, 3 Pick. 96; Story on Notes, § 197; *Whitaker v. Sumner*, 20 Pick. 404; *Jarvis v. Rogers*, 15 Mass. 396; *Garlick v. James*, 12 Johns. 146; *Cortelyou v. Lansing*, 2 Caines Cas. 200; *Wilson v. Little*, 2 Comst. 443.

SHAW, C. J.* This being an action of replevin for a promissory note, the specific paper writing, with the valuable contract upon it, as a visible and tangible object, in the nature of a chattel, capable of manual possession and delivery, the single question is, which of these parties has the property in this note, with the right of present possession. The plaintiffs, having taken the burden of proof, have proved both good title and actual possession of the note; and they have shown, beyond all doubt, that, having made no transfer of title, they lost it out of their possession, by means as purely accidental as if they had dropped it in the street, where it had been picked up by a stranger.

Then the question is, whether the defendants, a bank constituted for the purposes of dealing in money and money securities, have taken this note under such circumstances that the true owners cannot question their title. The ground relied on by the defendants is, that this had all the appearance of a busi-

* DEWEY, J. did not sit in this case.

ness note given for value by Brett & Company, payable to their own order, and by them indorsed in blank, so as to pass by delivery, and actually in the custody of Willis & Company, and by them produced and delivered to the bank for a valuable consideration.

The rule of law, designed to afford ample protection to the free currency and circulation to negotiable securities, transferable by indorsement or by delivery, during the time they have to run, having no indication of want of title on the face is, and we think ought to be, maintained with great strictness, in favor of persons taking them *bona fide*, in the due course of business, without notice actual or constructive of any want of good title on the part of the party negotiating them. *Wheeler v. Guild*, 20 Pick. 545.

But this rule is to be taken with a strict observance of the qualification, that the negotiable security be taken in the due course of business, without notice, or reasonable cause to suspect, that the party from whom it is taken has not the full title, which the possession of the security and the names borne upon it naturally import.

Had this note, with or without the indorsement of Willis & Company, been discounted by the bank, making it their own upon the credit of the parties to it, simply deducting the discount, it would have presented a very different question.

It is not easy to prescribe a general rule, as to what shall be the common course of business. It must depend much upon the circumstances of each particular case. In the present case, upon a review of the evidence, of which there was no conflict, the court are of opinion that the directions which the judge, at the trial, proposed to give to the jury, as stated to the counsel, were correct, and that the jury would have been well warranted in finding that the bank did not take the note in the ordinary course, under such circumstances, as to place themselves on the high ground of holders for value, without notice, and without anything to put them on inquiry.

It is true they had possession of the note so indorsed by the maker, that, like a note payable to bearer, the legal title would

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pass by delivery. But it was not discounted, or purchased, or received for the full amount on the single credit of the promisor. If never paid, it would not have been the loss of the bank, unless their principal debtor, to whom the loan was made, also failed. It was not indorsed by the borrower, or otherwise warranted by him that he had a good and unimpeachable title, and was therefore in this respect like a note indorsed "without recourse," which is not the usual course of transferring a security indorsed in blank.

We do not mean to say that the mere circumstance of taking such a note as collateral security would of itself be sufficient, when a new credit is given to a borrower merely on the credit of such security, and under such circumstances as would warrant a belief that such credit would not have been given the borrower without security. But the evidence in the present case does not show that the bank held the note in question as security for any particular debt, which they could identify. The evidence respecting their course of dealing leads to the conclusion, that where a temporary loan, or loan to be repaid on demand, was made, Willis & Company usually brought in notes to an equal or larger amount and deposited them as security. But as the notes had time to run, the loan might be repaid forthwith, being on demand, the notes were rather security to the bank for all such loans or any balance thereupon than for the particular loan then made. But the bank cannot now show any note or check in particular, for the security of which the note in question was given; nor is it shown, except from such general course of dealing, that any advance was made when this note was deposited.

But further, it appears from the testimony of the president, who conducted these negotiations, as agent for the bank, that, according to the above mentioned course of dealing, the bank did not take these notes under a belief or understanding that Willis & Company had a perfect and beneficial title in full to the notes, which they were accustomed to take as collateral; but that, as Willis & Company had the possession, which is *prima facie* a legal title, to securities payable to bearer, or to indorsee

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with his blank indorsement, they could, by their delivery, pass them as security. We think the fair result of this evidence is, that if, according to the usual course of dealing, this note was handed to the bank at the same time that a demand loan was made, the note was taken not solely or principally on its own credit, but on the credit of Willis & Company to this extent, that they had a legal title to the note, and a right to pass it to them as such security. They might well believe — the possession of the note and its condition, as apparently transferable by delivery, warranted them in believing — that Willis & Company had a good title; and they were chargeable with no want of good faith in taking it on that belief. Still the taking was under such circumstances as to put them upon their guard, to inquire into the title of Willis & Company, and take only such title as Willis & Company could give, as in case of assignment. When, therefore, it appears that, although this note was in such form that it was transferable by delivery by the true owner, yet that in point of fact it never had been delivered by the plaintiffs, the true owners, to Willis & Company, or any other person, the *prima facie* evidence, arising from the possession of Willis & Company, is effectually rebutted, they had no title, and when they passed it to the bank, by mistake or otherwise, no title passed to them; and taking into consideration all the circumstances under which the defendants came into possession of the note, they are not such indorsers for value and without notice, that they can hold it against the well established title of the plaintiffs.

Judgment on the verdict for the plaintiff.

Stevens & another v. Boston and Worcester Railroad Corporation.

**JOHN H. STEVENS & another vs. BOSTON AND WORCESTER
RAILROAD CORPORATION.**

A shipment of goods by the owner, under an agreement by which the consignee has advanced money thereon, and agreed to make a further advance on receiving the bill of lading, gives the consignee a title to the goods to secure both advances, as against one who afterwards, though before this bill of lading is delivered, receives a second bill of lading of the goods, with notice that the first has been issued.

A common carrier, receiving goods from a wrongdoer, has no lien thereon against the rightful owner, even for freight which he has paid to a previous carrier, by whom the owner had directed them to be carried.

REPLEVIN of three hundred and ninety seven barrels of flour. The answer denied the plaintiffs' property; and alleged that the defendants, as common carriers, brought the flour to Boston for Charles J. Bishop & Co., who paid the freight thereon, and for whom the defendants now held the flour; and that the defendants had a lien on the flour for the amount of the freight, either for their own benefit, or for the benefit of Bishop & Co., and the plaintiffs had no right to it without paying the freight.

At the trial in the court of common pleas, before *Mellen*, C. J., it appeared in evidence that the flour was originally the property of Thomas W. Williams; and that there were two bills of lading of this flour, both dated at Milwaukie, October 14th 1854, and signed by the master of the Propeller Bucephalus, one of which was made out to the plaintiffs, and stated that the shipment was made by said Williams; and the other, which stated that the shipment was made by William Brown & Co., was made out to Bishop & Co., who, before receiving it, had made advances on account of flour to be sent them by Brown & Co., but not upon this specific flour, and who paid the defendants the freight from Milwaukie to Boston, amounting to about \$700.

The plaintiffs introduced evidence tending to show that on said 14th of October (which was Saturday) the agent of the plaintiffs made an agreement to advance upon said flour \$3,000; \$1,500 on that day, and \$1,500 when he got the bill of lading; that he did actually advance \$1,500 on that day, about three

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o'clock in the afternoon, and ordered the flour to be put on board the Propeller Bucephalus for the plaintiffs; and on Monday, the 16th of October, got said bill of lading, and paid the additional \$1,500, as agreed.

It also appeared that the flour was put on board the Bucephalus on the evening or night of the 14th of October; that the bill of lading to Bishop & Co. was executed on the 15th of October, and delivered to Brown & Co. either on the 15th or 16th of October; and the bill of lading to the plaintiffs was delivered to them on the 16th of said October.

There was evidence tending to show that the firm of Brown & Co. on Friday or Saturday, the 13th or 14th of October, made an arrangement with Williams to advance upon said flour, and did actually advance thereon, six dollars per barrel; but there was conflicting evidence upon this point, and it was contended that Brown & Co. never advanced at all upon the flour, or, if at all, not until the 16th of October, after notice of the first bill of lading. It appeared that the captain of the Bucephalus declined to issue the bill of lading to Brown & Co., on the ground that he had already given one to the plaintiffs; and it was contended by the plaintiffs that the second bill of lading was a fraud of Williams and of Brown & Co. to deprive the plaintiffs of the flour in dispute.

The defendants contended, "that as the bill of lading was given to William Brown & Co. first, and the same was delivered for a good and valuable consideration, and without notice of the claims of the other party, the property vested in them, and could not be divested without their consent; that no title to said property could vest in the plaintiffs, in any event, till after the whole \$3,000 had been advanced, and the bill of lading had been delivered to them; that until this was done the transaction between Williams and the plaintiffs was incomplete; and that if said William Brown & Co. had, in good faith, and before that time, advanced upon said property, and received a bill of lading therefor, their title would be complete, and prior and superior to that of the plaintiffs."

They also contended, "that said goods having been brought

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over the defendants' road, they were entitled to hold the same for the freight thereof; and the fact that the freight had been paid by Bishop & Co. made no difference, because it was paid by them with the expectation of receiving the property; and if the same was not delivered to them, they would have a claim upon the defendants to recover back the freight so paid." And they further contended, "that, even if the plaintiffs were the owners of the property, still Bishop & Co. were entitled to hold the same for all advances made by them on account of the same."

The court instructed the jury, "that the questions of fact, which bill of lading was given first; whether William Brown & Co. had made any advances, in good faith, upon the flour; and whether they had notice of the plaintiffs' bill of lading when they received their own, were to be settled by the jury upon the testimony in the cause; that the title under which the plaintiffs claimed was, that Thomas W. Williams (who was admitted by both parties to have been the original owner of the flour in dispute) had conveyed it to them through the intervention of an agent; and that if the jury were satisfied that Williams had, on Saturday the 14th of October, agreed with the plaintiffs' agent to consign the specific barrels of flour in dispute to the plaintiffs, and to receive as an advance upon the same \$1,500 in cash and \$1,500 on delivery of the bill of lading; and that the agent of the plaintiffs did then pay the advance of \$1,500, and direct Williams to ship said flour to the plaintiffs by the Propeller Bucephalus, and that Williams did accordingly deliver the flour to the master of the Bucephalus, (said master being a common carrier between Milwaukie and Buffalo,) to be forwarded to the plaintiffs, and that the master received the same on board his propeller, and did on that day, or the next, issue his bill of lading to the plaintiffs for said flour; then, after these transactions, the right to the possession of the flour was in the plaintiffs, and the master of the Bucephalus could not issue new bills of lading to Brown & Co., either with or without the direction of Williams; that although the additional \$1,500 were to be paid on the receipt of the bill of lading, that fact alone did not make

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the title to the flour incomplete, or prevent the right of possession from vesting in the plaintiffs, or enable Williams to make a new sale of it after it was delivered to the common carrier for the plaintiffs; and that although the second bill of lading might have come into the possession of Brown & Co. before the first bill of lading came into the possession of the plaintiffs' agent, that did not take away the plaintiffs' right of possession, as the evidence tended to show one of the firm of Brown & Co. had previous notice of the issue of the plaintiffs' bill of lading."

The court also instructed the jury, that the defendants could not retain possession of the flour for the payment of the freight once due to them as common carriers, and paid by Bishop & Co. before the commencement of this suit; and declined to instruct the jury, according to the defendants' request, that even if the plaintiffs were the owners of the property, still Bishop & Co. were entitled to hold the same for all advances made by them on account of the same.

The court also instructed the jury, for the purposes of the trial, that the burden of proof was upon the plaintiffs to show that they had made advances upon the flour, which had not, up to the time of the trial, been paid.

The jury returned a verdict for the plaintiffs, and the defendants alleged exceptions.

W. Brigham, for the defendants.

H. F. Durant, for the plaintiffs.

BY THE COURT. 1. The defence is placed in the answer, partly on the defendants' own lien for freight, and partly on the rights of Bishop & Co.; but Bishop & Co. are the real defendants. It is a question of priority of lien — of priority of title. This case depends on a question of fact — To whom did Williams first transfer the possession? But it does not depend on the mere priority of signing either bill of lading; it is the shipment which gives the lien — the delivery on board the boat of the common carrier, with notice to the party, which would vest the property in him. The question is, which in fact made the advance; and on whose account did Williams deliver it on board the *Bucephalus*; for possession is essential to the lien

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This question was left to the jury, with instructions which were full, accurate and well adapted to the evidence.

If the first delivery was to the plaintiffs, the second delivery was a fraud upon them. To sign two bills of lading at the same time was a fraud upon somebody, and it was a question for the jury upon which.

2 The defendants objected that, as the plaintiffs actually advanced only \$1,500 when the contract was made with them, the delivery could not be considered as made until they advanced the remaining \$1,500. But this is a question of special property, of possession necessary to support the lien; and when the lien had attached, it would support advances to be made as well as those already made.

3. Then a question arises as to the lien of the defendants. It appears that a custom, and a very convenient one, has sprung up, for each carrier on a line of transportation to pay the previous carrier, so that the freight goes on accumulating, and the consignee receives the goods of the last carrier, on paying to him the full amount of all the freights. The defendants' right depends on the question whether they rightfully paid the freight to a party entitled to it. *Robinson v. Baker*, 5 Cush. 137. If the freight would not be due to the subsequent carrier, it would not be due to the previous carrier, and therefore the subsequent carrier could not acquire any lien by claiming under a previous one.

4. Then it was said that the carriage, by whomsoever rendered, was beneficial to the plaintiffs, as far as Albany; because, by either bill of lading, the property was intended to be carried by the same conveyance to that point. But the defendants' title depends on the title of their employers. *Non constat* that the injury did not exceed the benefit. The true reason why the defendants have no lien is, that those who undertook to ship had no authority to ship, and therefore no authority to create a lien on the goods.

Exceptions overruled.

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**WILLIAM W. CORCORAN & another vs. DAVID HENSHAW.
SAME vs. JOHN HENSHAW & another, Executors.**

H., C. and others agreed by indenture with the contractors for building a canal to take certain amounts of bonds of the canal company at the rate of \$60 for every \$100, payable in instalments; and trustees were appointed to superintend the completion of the canal, receive the bonds, and issue them to the subscribers, from time to time, on being paid the stipulated price. More than two years afterwards H. gave C. an order on the trustees, which they accepted, to deliver to C., on his paying them therefor sixty cents on the dollar, such bonds to a certain amount, "which I am entitled to receive under my subscription;" and with this order gave C. a bill charging him with this amount of bonds at eighty five and a half per cent., deducting the sixty per cent. to be paid on the delivery of the bonds, and adding an agreement that H., "if the above bonds are not delivered by said trustees" within six weeks, should "account to C. for the interest upon" the balance "after said time until said bonds are delivered." *Held*, that this was a sale to C. of H.'s right to take, on payment of sixty per cent., bonds to the amount specified, without any warranty of title to the bonds; that the agreement to pay "interest" was valid, and obliged H. to pay a continuing annuity of six per cent. on such balance, determinable upon the delivery of the bonds to C., either by the trustees, or by H. or his representatives; that a tender of the bonds to C., by the executors of H., three years later, with or without the consent of the trustees, put an end to this obligation; and that C., if he absolutely refused to accept the bonds so tendered, on the ground that the contract of all the parties was broken, and that he was not then bound to accept or pay for them for any purpose, could not object to the validity or title of the bonds so tendered.

TWO ACTIONS OF CONTRACT upon the agreements of David Henshaw, contained in this paper :

" \$23,000.

Boston, January 24, 1850.

Please deliver to Messrs. Corcoran and Riggs or order Bonds of the Chesapeake and Ohio Canal Company to the amount of twenty three thousand dollars, which I am now entitled to receive under my subscription of \$100,000, on their paying you therefor sixty cents on the dollar.

" Very respectfully your obedient servant,

" David Henshaw.

" Messrs. Nathan Hale and others, trustees, &c."

" Boston, January 23, 1850. Accepted for the trustees,

" Nathan Hale."

" Messrs. Corcoran and Riggs To David Henshaw, Dr.

" To an order on Nathan Hale and others, trustees, for \$23,000 Chesapeake and Ohio Canal

bonds, 85 $\frac{1}{2}$ \$19,665 00

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"Deduct, to be paid by Messrs. C. & R. to said trustees when said bonds are delivered, 60 per cent. 13,800 00

"Difference payable as cash to D. H. \$5,865 00

"It is understood that if the above bonds are not delivered by said trustees, first week in March, that I am to account to Messrs. Corcoran & Riggs for the interest upon said premium, viz: (\$5,865,00) after said time, until said bonds are delivered.

"Boston, January 24, 1850. David Henshaw."

The first action was brought on the 30th of October 1854, during the lifetime of David Henshaw, to recover interest, from the 6th of March 1850 to the date of the writ, upon the sum of \$5,865 paid by the plaintiffs according to the contract. The second action was brought on the 15th of August 1854, against David Henshaw's executors, for the interest subsequently accrued, and also for not delivering bonds to the plaintiffs according to the contract. Both actions were tried together before *Thomas, J.*, who reserved them for the determination of the whole court, with power to draw such inferences from the evidence as a jury might draw. All the facts material to the understanding of the questions of law decided are stated in the opinion.

C. P. Curtis & C. P. Curtis, Jr. for the plaintiffs.

W. Whiting & W. G. Russell, for the defendants.

SHAW, C. J.* These two actions are founded on the same contract and cause of action; the first commenced against Henshaw in his lifetime, and now defended by his executors; the second brought against the executors after Henshaw's decease. Both rest on the same grounds.

The paper relied on as the contract between the parties, respecting the transfer and assignment of certain bonds of the Chesapeake and Ohio Canal Company, is not a direct agreement, expressing the contract of sale and assignment of these bonds, and the terms and conditions on which it is to be made but consists of two brief memoranda, on the same paper, dated

THOMAS, J. was not present when this case was argued.

January 23d 1850, and signed by Henshaw, the one in the form of a bill, in which the plaintiffs, Corcoran & Riggs, are charged and made debtors to Henshaw, "to an order on Nathan Hale and others, trustees, for \$23,000 Chesapeake and Ohio Canal bonds," at eighty five and a half cents on the dollar, subject to a deduction of sixty per cent. to be paid by Corcoran & Riggs to the trustees, when the bonds should be delivered. This was accompanied by an order drawn by Henshaw on Nathan Hale and others, trustees, directing them to deliver to the plaintiffs bonds of the Chesapeake and Ohio Canal Company, to the amount of \$23,000, "which I am now entitled to receive under my subscription of \$100,000, on their paying you [the trustees] therefor sixty cents on the dollar." This was accepted by Hale, for the trustees, the acceptance being dated on the day previous to that of the order. Probably the acceptance was procured by Henshaw before it was delivered to Corcoran & Riggs.

These memoranda are so brief, have so many references to external facts and persons unexplained, that it is difficult to learn from them what was the legal effect of this contract, without reference to the other transactions and the relations of the parties.

What was the nature of these bonds? what were the trusts and powers of the trustees? what was Henshaw's title under his subscription of \$100,000? the effect of his order on the trustees, and of their acceptance? To ascertain these relations, we must resort to the indenture referred to, an elaborate contract, to which the plaintiffs and the defendant Henshaw were both parties in the same right.

The indenture was dated the 29th of September 1847, between James Hunter, Thomas G. Harris and William B. Thompson of the first part, David Henshaw, Corcoran & Riggs and a large number of others of the second part, and John Davis, Horatio Allen and Nathan Hale of the third part.

This indenture recites a former contract and agreement, dated the 15th of April 1845, between the Chesapeake and Ohio Canal Company, and Walter Gwynne, William B. Thompson, James Hunter and Walter Cunningham, a copy of which is annexed to

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this indenture, by which said four persons (two of whom are the same with two of the persons being the first party to this indenture) had contracted, on certain conditions, to build and complete said canal from lam No. 6 to Cumberland, receiving from said canal company bonds, some of which have been guaranteed by other parties; that they had made various sub-contracts for the execution of portions of the work, which were still in force, but remained unexecuted; that, in consequence of various unforeseen obstacles, the stipulations entered into by the said parties by the said articles, for completing the said canal, had remained unexecuted; but that said Hunter, Harris and Thompson, having succeeded in their endeavors to obtain the necessary aid of other parties to enable them to complete said canal, and confiding in the readiness of the canal company to accept the contract of said Hunter, Harris and Thompson to complete said canal, had engaged to receive exclusively, in place of other engagements, the bonds of said canal company, which bonds are to be issued by said company in conformity with the act of the State of Maryland for the completion of the said canal, which bonds are to be made prior liens on the resources and tolls of the canal; that as the present value of the bonds of the canal company must depend on the assurance parties have of the early completion of the canal, the parties of the first part have found it necessary to enter into a contract with responsible persons, who have engaged to take said bonds, as the same shall be issued, at a price agreed, for the purpose of obtaining the necessary funds, to an amount deemed sufficient, viz: \$500,000 in money, in addition to certain guaranties, and they have accordingly entered into an engagement with David Henshaw and others, parties of the second part, to sell them of said bonds, as they shall be issued, in payment of said work, the amount set against their respective names, they paying therefor, on delivery, at the rate of \$60 in money for every \$100 in bonds, the same to be delivered from time to time, as they shall be issued, in proportions to be specified, within certain periods, the amount of bonds to be \$833,333, and the amount to be paid in money \$500,000; that for more effectually carrying

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these agreements into effect, the parties have thought it expedient to appoint trustees who shall act as agents and attorneys for the parties of the first part, and the parties have agreed to entrust the same to John Davis, Horatio Allen and Nathan Hale, parties of the third part, who undertake the charge of carrying into effect the execution of said contract for completing the canal, assuming the direction and superintendence of the work, receiving the bonds to be issued by the canal company, delivering to each of the subscribers such an amount, from time to time, of the said bonds, as they will be entitled respectively to receive and bound to purchase, disposing of the residue in the manner to accomplish most effectually the objects of the indenture and the intent of the parties, and applying the proceeds to the payment for work and in discharge of engagements under the said contract.

The indenture then proceeds by proper stipulations to carry these purposes into effect. The parties of the first part make the necessary assignments and confer the necessary powers, the parties concur in the appointment of Davis, Allen and Hale, as attorneys irrevocable and trustees; and whenever, on completion of any portion of said work, or the performance of any of the conditions of the former contract with the canal company, the parties of the first part (contractors) shall be entitled to any payment in bonds, by virtue of said contract, then the agents and trustees are authorized to receive the same and give good acquittances therefor, and on so receiving them, to apply and appropriate them. The parties of the second part agree to take and pay for bonds, each for the amount set against his name, at the rate of \$60 each for \$100 in bonds, with limitations of the time within which instalments are to be paid in, and the amount of each instalment, with a stipulation for certain payments to be made at banks named. The parties of the third part accept the trust, and covenant, each for himself and not for the others, to carry the same into effect, by carrying into effect, as far as shall be in their power, the former contract with the canal company, by enforcing the contracts of subcontractors, making new contracts, by receiving the bonds which shall from time to

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time become payable by the canal company, and exchanging such of them for the sums of money stipulated to be paid for them, by the parties of the second part (the subscribers), disposing of further portions, &c.; the trustees agree to keep regular accounts.

To this indenture, duly executed, David Henshaw and Corcoran & Riggs were subscribers, as parties of the second part, the former to the amount of \$100,000, and the latter to the amount of \$241,600; and the whole amount required was subscribed by about thirty parties.

By this indenture we ascertain what was the nature of the bonds of the Chesapeake and Ohio Canal Company, which were the subject of the contract of sale and assignment by Henshaw to Corcoran & Riggs; what the one intended to transfer and the other to acquire; how and in what qualified manner Henshaw was entitled to them under his subscription for \$100,000; what was the power and authority of the trustees to receive the bonds of the canal company, and to deliver them to the subscribers from time to time, in limited amounts, on receiving from such subscribers \$60 on \$100, to be used and applied by themselves to the completion of the canal and other uses, as expressed in the indenture. We also learn that the facts, and the relations of all these parties named in the indenture, were determined by a formal instrument, to which Henshaw and Corcoran & Riggs were largely interested parties, and of course that they were as well known to one of these parties as to the other.

It may be important, also, to consider the dates of the two transactions, as connected with the things contemplated to be done, and things which probably were done in the meantime. The indenture was made in September 1847, and the assignment to Corcoran & Riggs in January 1850, that is, after a lapse of about two years and four months. The leading object of the arrangement was to effect the immediate completion of the canal, by the new contractors, but under the direction and superintendence of the trustees, and in strict subordination to their powers, as agents and trustees, conformably to the former

contract. This was undoubtedly considered as a valuable and profitable contract with the canal company, in favor of the contractors, because it is manifestly contemplated by the parties to the indenture, that they could afford to complete the canal on the original terms, though, in order to accomplish it, they must raise half a million of dollars, at the enormous sacrifice of paying \$100 for every \$60 advanced.

After the lapse of more than two years, the premium stipulated to be paid by Corcoran & Riggs was a fraction over \$25 on each \$100 of the expected bonds, which we may presume to be the market price at the time; and from this circumstance we may presume that much work had been done on the canal, and that its prospects were good. When the canal should be completed, then bondholders were to have a prior lien on its revenues, except only what might be required for necessary current expenses. If we may judge from experience, these bonds had, during these two years and more, been in the various stock markets of the country, with varying prices, but on the whole rising. We are also to consider that, though sold in 1850 at the great advance of \$25 for \$60 to be advanced, there was still room for further advance; and if the enterprise should prove successful, each bondholder would receive nearly \$15 more for each \$60 advance in addition to the interest, which left an opening for a large profit to the purchaser at the then market rate. Of this probably no capitalist was better able to judge than Corcoran & Riggs.

With these views we will now consider the contract of assignment and conveyance of the bonds, which is the basis of these actions. We assume that these securities, though called bonds, were, by force of the statute under which they were authorized, by a blank indorsement, or in some other mode, negotiable, and transferable by delivery. No question is made on this point, and the whole argument on both sides has proceeded on the ground that a good legal title to these bonds would pass by an assignment and delivery, as in case of a note payable to bearer, or to a payee named, or order, and by him indorsed in blank.

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We will first consider the assignment, that being the instrument of transfer between the parties, and the order on the trustees being only an instrument and means of giving effect to and executing the assignment.

The assignment assumes the form of a bill of sale of a chattel. "Messrs. Corcoran & Riggs to David Henshaw Dr. To an order on Nathan Hale and others, trustees, for \$23,000 Chesapeake and Ohio Canal bonds, at 85 $\frac{1}{2}$," and carried out at the entire sum which they would cost the purchasers. This was not the sum which they were to pay Henshaw the seller. They were in no event to pay him anything more than the premium. Hale and others were not his agents to receive \$60 on each \$100 of bonds for him, but for themselves to hold and use and apply, according to the trusts of the indenture.

Then what did the purchasers acquire by the nature of this bargain and the terms of this bill of sale or assignment? Not chattels, not securities in the nature of chattels, such as notes to bearer or certificates of stock, but a right of preemption, a right to purchase of a third party, pursuant to a preexisting agreement, certain bonds for \$60 in the \$100, bonds which would secure the payment of \$100 to the purchaser for each sum of \$60 to be paid for them, on delivery. It being a right to purchase of the trustees, on payment to them of \$60 in the \$100, their acceptance was an acknowledgment of notice of such transfer to the extent of \$23,000 of bonds, and of their assent to it, so that afterwards, in reference to that amount of bonds, they stood in the same relation to Corcoran & Riggs in which they previously stood to Henshaw. The right was fully acquired by the purchasers by the delivery by Henshaw of this order on the trustees, and their acceptance of it, without any further act to be done by the latter. Had the enterprise been successful, and had the bonds proved available according to their tenor, the purchasers would have been reimbursed their advance, with a profit of \$15 on \$85 advanced, viz: \$25 premium for the right to purchase the bonds of Henshaw, and \$60 for the purchase money, to the trustees.

Literally, the bill of sale was of "an order" on the trus-

tees. But under the circumstances, this order transferred all Henshaw's right. What that right was, and what the purchasers understood it to be, were determined by the various provisions and terms of the indenture, and nothing was needed to transfer the right from one subscriber to another, but an order on the trustees and an acceptance by them. The order itself, to some extent, explains what the parties intended, by a direct reference to the subscription of Henshaw of \$100,000. It was not a sale of bonds *in presenti*, deliverable *in futuro*; it was not an executory contract for a sale and delivery of bonds at another time; it was the sale of a present qualified right to purchase the bonds from those who, by the contract, were appointed to sell them. This right passed by the assignment and order.

In these papers there is no express stipulation or warranty of title or quality of anything. But it is said in the argument, that if a man sells property, describing it as of a particular character or quality, he does, by implication of law, warrant it to be of that character or quality. This principle, however sound, will not aid the plaintiffs. Nothing is described in this assignment but the vendor's right, to be obtained by means of an order, which was exactly described, conformably to the fact, as ascertained and explained by the indenture.

Another maxim is relied on, that in every sale of personal property the law implies a warranty on the part of the vendor that he is the owner of the property and can give a good title. But this well known rule of law is equally unavailing to charge Henshaw. In these memoranda, and in this transaction, Henshaw never was, and never professed to be, the owner of the bonds; on the contrary, he could not be the owner of the bonds until he had paid the stipulated sixty per cent. for which they were to be given, and taken them into his own possession, by delivery from the trustees. The very contract itself implies that this never had been done, and the purpose of the contract was, to enable the assignees to do what the assignor was to do, in order to make them his own and have property in them.

It is further argued that the words in the order, after the words

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"bonds," &c. viz: "which I am now entitled to receive under my subscription of \$100,000," amount to a warranty that he was then entitled to receive the bonds from the trustees. But we think this is not the true construction. If the trustees were then ready to deliver the bonds, why resort to the instrumentality of an order and acceptance, which looked to some future time for their delivery? Again; the vendor does not speak of his right as an absolute and unqualified right to receive, but as his title to receive "under his subscription," or according to his subscription, which both parties understood to be a limited and qualified right, and both knew what those limitations and qualifications were.

Nor is there any ground to contend that there was any misrepresentation, on the part of Henshaw, of the nature and character of the bonds in question, or of his title to them, or of the cases in which, or the times when, and purposes for which the trustees were to receive them, or of the nature of the obligation of the trustees to deliver them. All the facts bearing on these points were fully known to the plaintiffs.

Whether, by their acceptance, the trustees incurred any obligation to these plaintiffs, to deliver the bonds absolutely, is a question on which it is not necessary to give any opinion in the present case. But it may be proper to remark, that if the order on them was to deliver to these plaintiffs \$23,000 of the first bonds which should come into their hands, applicable to the subscription of Henshaw, according to the stipulations and trusts in the indenture, and not otherwise, their acceptance would be construed with the limitations expressed in the order. It is testified, and not controverted, that no bonds did afterwards come to the hands of the trustees, applicable to the subscription of Henshaw, except the sum of \$5,000, which was actually delivered to the plaintiffs, and thus satisfied their contract *pro tanto*. Then, if the above is the true construction of the acceptance of the trustees, as construed in reference to a contract to which these plaintiffs, Henshaw and the trustees were all parties, then it would seem that the trustees contracted no obligation by their acceptance, which they have not performed. But this is a question to be decided when it arises.

Here was a species of marketable commodity, in the nature of stock, well known to both these parties. It had already greatly risen in value in the market, beyond the cost price ; but there was room for it to rise still further, and afford a profit to the purchaser. But it was attended with some hazard ; and this hazard, in the opinion of the court, the purchaser intended and was content to take. He proposed to purchase Henshaw's right of preëmption, with the means of asserting it ; and this he obtained. The trustees and acceptors of the order were an independent party ; they were not the agents of Henshaw ; nor was he bound by law, that they should perform what they had undertaken. He entered into no obligation to the plaintiffs, express or implied, to deliver the bonds or guaranty their delivery ; and the failure of the trustees to deliver the bonds, whether justifiable or not, as between these plaintiffs and themselves, was not a breach of any obligation of Henshaw, for which this action will lie on the contract.

Nor has the consideration failed, were this a suit to recover back the purchase money. It may be likened to a case, where a number of persons have associated to establish a bank, and the subscription for capital is full, and a charter is obtained. The prospect is so favorable, that the scrip or right to take shares is at a premium. A. B., for a consideration, transfers his right to C. D., and receives his authority to take his shares to his own use. Afterwards, difficulties arise in organizing the bank, or such changes in financial affairs, that it ceases to hold out a prospect of profit, the project is abandoned, and the stock never paid in. It appears to us, that there was no failure of consideration, the purchaser had the right which he stipulated for, with a full knowledge of all the facts, and took his chance whether it would be profitable or not. So of a patent right, or other incorporeal right, actual or inchoate. Where the purchaser agrees to pay for a chance, and there is no misrepresentation and no warranty on the part of the vendor, the purchaser whilst he will enjoy the gain if it prove profitable, must stand the hazard if it prove a failure. Other analogous cases could be readily suggested.

We do not adopt the argument pressed by the counsel for the defendants, that the plaintiffs did not make reasonable demand upon Hale; or did not tender the sixty per cent. in money; or did not cause protest to be made of the nondelivery of the bonds; or that they did not give due notice to Henshaw of the nondelivery of the bonds by the trustees; but simply place our judgment on the ground, that the subject matter of the bargain was Henshaw's right of preëmption of property never his own, and the full performance of that agreement, by the execution and delivery, to the vendees, of the assignment of his right, and the simultaneous delivery of his order on the trustees, accepted by them, which together vested in them all the right, title and interest, which was the subject of the contract.

2. There is another claim made on the part of the plaintiffs, on a separate and distinct stipulation of Henshaw, for interest. This claim is made in both actions, the one brought against Henshaw in his lifetime, which was solely for interest, and that brought against his executors after his decease. This was a stipulation by Henshaw, appended to the bill of sale or assignment, by which he engaged with the plaintiffs, that if the above bonds were not delivered by said trustees the first week in March, he was to account to them for the interest on said premium after that time, till the bonds were delivered.

This we consider as a good and valid contract, made on good consideration, and to be performed according to its terms. Strictly speaking, it is not interest. Interest is money to be paid for the use of capital, on a loan of money, or the forbearance of a debt, and becomes part of and incident to a debt; or it is damages for the detention of a debt due, and fixed by law at a given rate, in proportion to the amount of money lent, or detained, and the time for which it is thus lent or detained. In either case, it is incident to a debt, to be paid with it and as a part of it. Here was no loan, or forbearance of money due, no debt detained, and therefore we say it was not, strictly speaking, interest. It was like interest in these respects; it was to be calculated upon a certain sum, and depend on time. It was, as stated by one of the learned counsel in argument, an annuity

not however, as stated, a perpetual annuity, but a continuing annuity, determinable upon the delivery of the bonds. But upon the happening of that event it must cease by the terms of the express contract by which it was created. Such is the effect of Henshaw's contract. *Suffolk Bank v. Worcester Bank*, 5 Pick. 106.

The question then is, whether the running of this interest or annuity can be put an end to, by a delivery or tender of the bonds, by any party other than the trustees. It is probable that the parties had in view a delivery of the bonds by the trustees, an event then expected by both parties to occur, but without any limit of time within which it should be done. Still it was an act, the performance of which, by Henshaw or his personal representatives, would be as beneficial to the plaintiffs as if done by the trustees, viz: the obtaining of the bonds, and paying therefor, on delivery, sixty cents on the dollar of the nominal amount. The act to be done, on which Henshaw's obligation to pay the stipulated interest or annuity was to cease and determine, could be as effectually and beneficially done by him or his representatives, as by the trustees. And it is to be considered that, in the written memorandum constituting the obligation to pay such interest, it is to continue, not until the trustees shall deliver the bonds, but "until said bonds are delivered," without saying by whom. Under these circumstances, the court are of opinion, that Henshaw and his representatives had such an interest in the performance of this condition, duty or act, that they might themselves perform it, in order to determine the daily accruing interest, or annuity, which was to cease on its performance.

It is objected on the part of the plaintiffs that a right of action having accrued for the nondelivery of the bonds pursuant to the contract, such right of action could not be defeated by a subsequent tender of the articles; and that when a cause of action has accrued for the nondelivery of articles, the right to receive the value in money by way of damages becomes vested.

If this argument goes upon the ground that Henshaw had broken his obligation by the nondelivery of the bonds, it cannot

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avail, as we have already decided that he was under no contract that the bonds should be delivered.

If the argument assumes that the trustees had broken their obligation by the nondelivery of the bonds, and had become answerable for the value in money as damages, and that the interest now claimed is due, in the nature of damages, as interest on account of detaining such sum, the first answer is, that it has not yet been decided, that there has been such a breach on the part of the trustees, or that such cause of action against them has accrued to the plaintiffs.

But a more decisive answer is, that the defendant did not make his undertaking to pay interest, so as to continue till the trustees had fully performed their contract; but until the bonds should be delivered, which was a condition which he himself might perform. Nor was the tender made by the executors, after the decease of their testator, made for the purpose of defeating any right of action against the trustees, if any, which had accrued to the plaintiffs; but for the purpose of doing a duty, or complying with a condition, which, by the terms of their testator's undertaking, would terminate his liability, and that of his estate, to a continuing payment of the interest or annuity, on his special agreement to that effect. In this view, it appears to us to be immaterial whether the tender was made with the consent and concurrence of the trustees or not. The evidence is, that they neither assented nor objected, but declined giving any authority to the executors to act for them.

3. Several objections are taken to the tender of bonds, made by the executors of Mr. Henshaw to Messrs. Corcoran & Riggs, in February 1853, as proved by the deposition of Chilton :

That it was not made till after the commencement of the first action. We do not consider it a bar to either action, but only as fixing a time down to which the second action will lie.

That it was not made in behalf of the trustees, nor by their authority. For reasons already stated, we think it was rightly made in their own behalf as executors.

That it was not made in money. This again presupposes that Henshaw and his estate had become liable in damages, as for a breach of contract, which was not the case.

That it proceeds on the ground that the contract was still in force. The plaintiffs' contract to pay a continuing interest annuity was still in force, not broken prior to the tender, but determinable upon such tender.

4. Several other objections, as to the genuineness and sufficiency of the bonds, the property of the defendants in them and the like, we think, are all answered by the fact that Corcoran, to whom they were offered, declined to accept them on any terms, on the ground that the contract of all the parties was broken, and that he was not bound to accept and pay for them, at that time or for any purpose.

Finally, the court are of opinion that the plaintiffs are entitled, in the first action, to recover interest on the amount—deducting that due in respect to \$5,000 in bonds, which were in fact delivered by the trustees in March 1850—from the time fixed for its commencement, in the memorandum, to the commencement of the first action; and in the second, the same rate of interest from the time of the commencement of the first to the time of the tender, with costs.



JOHN A. BLANCHARD & others vs. WILLIAM K. PAGE & others.

The shipper named in a bill of lading may sue the carrier for an injury to the goods although he has no property, general or special, therein.

ASSUMPSIT on a bill of lading and on certain receipts. At the trial in this court at March term 1854, *Merrick, J.* ordered a nonsuit, subject to the opinion of the whole court, who, after argument, delivered an opinion in favor of the defendants. The plaintiffs thereupon moved for a rehearing, which was granted, and the case reargued in writing. The facts appear in the opinion.

SHAW, C. J. This is an action of contract, brought by John A. Blanchard and others, constituting the firm of Blanchard,

Blanchard & others v. Page & others.

Converse & Co., merchants of Boston, against Rufus K. Page and others, owners of the ship *St. Peters*, to recover damage for a loss on goods delivered to the defendants at Boston, to be carried, for a stipulated freight, to New Orleans. The ship was put up for freight by advertisement, by the authority of the defendants, as a general ship, by Silloway, Calef & Co. shipping agents, and a bill of lading was signed in behalf of the master, by one of the shipping agents, dated April 1851.

By the bill of lading, the goods purported to be shipped by Blanchard, Converse & Co. on board the ship *St. Peters*, master, and bound to New Orleans, to say, &c. goods enumerated, being marked, &c. and are to be delivered, in like good order, at New Orleans, (dangers of the seas only excepted,) unto A. J. Gaines & Co. or to assigns, they paying freight for said goods, at rates stated.

This is in the usual form of a bill of lading, prepared to be signed by the master of such freighting vessel; this was not so signed, but signed by one of the shipping agents, "for master." It is found that no master had been then appointed, but it was so signed by the authority of the owners. No question is made in the present case, that the defendants are liable; but we mention this for the purpose of making a preliminary remark or two upon the nature of this species of mercantile contract, as usually in fact made by the master.

A bill of lading, though commonly made by the master, is considered in law as made with the owners also, and both he and they are separately bound to the performance of it. *Abbott on Shipping* (7th ed.) 319. *Boson v. Sandford*, 3 Mod. 321. *Ellis v. Turner*, 8 T. R. 531. The ground is this: the contract in terms is the act of the master, who has possession of the ship and the conduct of the voyage, and binds him; but as the freight or compensation for carriage enures to the benefit of the owners, and the master acts in their behalf, and as their agent, they are also liable.

Another observation is, that although, as between the master and owners of a freighting vessel, the master is entitled, in the first instance, to collect and receive freight due according to bills

of lading, and may recover it even against a shipper who has against his consent paid the owner; yet the reason plainly is, because, by the maritime law, and the custom of merchants, the master has a lien on such freight, for the payment of seamen's wages and other disbursements, and such lien, on mere debts or choses in action, can only be preserved by giving the master the power, in the first instance, to collect them, he being accountable over to the owners, as those entitled to the profits. *Lewis v. Hancock*, 11 Mass. 72. But see *Smith v. Plummer*, 1 B. & Ald. 575; *Ingersoll v. Van Bokkelen*, 7 Cow. 670.

Who are owners of a vessel for a particular voyage, and entitled to the profits of a particular enterprise, where the vessel has been chartered, or let out, by parol agreement or otherwise, is a distinct question, depending on the terms of the charter party or other contract of hiring, and not material to the present case.

The precise question then in the present case is this: whether the plaintiffs, named as shippers of the goods in the bill of lading, may maintain an action for damage done to the goods, (not excepted as caused by perils of the sea,) after they were received by the defendants, at the ship, for the purpose of carriage, and before they were delivered to and received by the consignees at New Orleans, named in the bill of lading, although it is shown, by evidence *aliunde*, that the plaintiffs had no right of property, general or special, in the goods, and no other right or interest in their safe carriage, except that arising from the bill of lading.

The facts are these: that the goods were all purchased in Boston, by Sutton, Griffiths & Co. of Fort Smith, Arkansas, by Sutton, one of the firm; that a small parcel of the goods were purchased of the plaintiffs, and the residue of various Boston houses; that the plaintiffs were authorized and requested by Sutton, Griffiths & Co. to cause the goods purchased of them, and also those purchased of all the other sellers in Boston, to be shipped on board of a vessel for New Orleans, to a forwarding house there, named by them, A. Q. Gaines & Co., to be forwarded by them to the owners of the goods at Fort Smith. All these goods, at the time of purchase, were paid for by Sutton, Griffiths & Co., by notes on time, which were all paid at

maturity. Such payment by notes negotiable must be deemed *prima facie* payment and satisfaction by the general rule of the common law, independently of the peculiar rule of Massachusetts, unless such notes fail to be paid at maturity, and are offered to be returned, and the price is demanded. But even without such payment by note, the sale of the goods on credit, and the actual delivery to a common carrier for the vendee, would vest the general property in the vendee, subject only to a conditional right of stoppage *in transitu*, if the vendee should become insolvent before the arrival of the goods. But no question of this kind arises, and therefore the evidence shows conclusively, that all the goods were the property of Sutton, Griffiths & Co. at the time of the shipment and of the alleged loss. We therefore assume, for the purpose of discussing this question intelligibly, that they were the sole owners of the goods during their transit; that neither Blanchard, Converse & Co., the shippers and present plaintiffs, had any interest in the goods, or in their safe carriage and delivery, except what arises from the bill of lading itself; nor had Gaines & Co., the consignees at New Orleans, any interest in the goods, but only an authority from Sutton, Griffiths & Co. to receive the goods as their agents at New Orleans, and forward the same to them at Fort Smith, a distant point in the interior, to pay the freight, and take the suitable measures for so forwarding the goods.

It is proper, however, to state that the plaintiffs rely, not only upon the bill of lading, but upon certain receipts given by the defendants to the carters and truckmen by whom the goods were delivered at the vessel, and a count in the declaration is framed upon the contracts arising from these receipts. The fact stated in the case is, that in the first instance the defendants gave receipts for the goods, as goods received on board the *St. Peters*, for carriage to New Orleans, in good order, which were given up when the bill of lading was signed and delivered to the plaintiffs. We think, however, that these receipts can have no bearing in the case. Whatever were the terms in which they were expressed, they were given for a temporary purpose; when that was accomplished, they were taken up and cancelled,

and the bill of lading substituted for them, and that must be taken as expressing the final intentions of the parties. If the receipts did not vary from the bill of lading, they were immaterial; if they did, the bill of lading, as the latest expression of the will of the parties, supersedes and controls them, though till such bill of lading is given, the receipts are good evidence of the shipper's rights. *Craven v. Ryder*, 6 Taunt. 433. The shipper may always direct to whom the goods laden on board by him shall be deliverable; and even after the bill of lading is signed and handed to the shipper by the master, the shipper may alter the destination and direct the goods to be delivered to another consignee, unless the bill of lading has been delivered or forwarded to the consignee first named, or to some one for his use. *Mitchel v. Ede*, 11 Ad. & El. 888. *Ruck v. Hatfield*, 5 B. & Ald. 632. *Thompson v. Trail*, 2 Car. & P. 334.

We are then brought back to the question, supposing the defendants as shipowners are liable to somebody, for the alleged damage done to the goods, after the defendants became responsible, as carriers, for their safety, and before their arrival at the place of destination, whether by law the plaintiffs are entitled to bring this action and recover the damages actually sustained. This brings us to consider the nature of a bill of lading, under the law, modified by the custom of merchants, which may be now taken as part of the law of the land; whether it constitutes an express or implied contract; if so, between what parties, and what are the mutual rights and liabilities of such parties under the contract.

It seems to us well established that a bill of lading constitutes a written simple contract between the shipowner and the shipper, that is, the person who on the bill of lading appears to be the shipper, without words showing that he acts in a representative capacity binding the shipowner to the shipper, and subjecting him to the liabilities of a common carrier of goods by sea, for instance, to stow and keep the goods safely, and carry them to the place of destination mentioned, and deliver them to the shipper himself, or to a person named by him, or to the indorsee of such person, or, if the name be left blank, to a

person to be named afterwards, (with usual exceptions,) he or they (consignee or his assigns) paying freight, &c. ; and binding upon the shipper to pay freight to the shipowner, or his agent, at the rates stipulated, on delivery of the goods at the place of destination, if they arrive in safety, and the shipowners, by their agent, the master, are then ready to deliver them, on such payment being made or tendered.

The bill of lading does not contain express words importing promise, contract or stipulation ; but it contains words equivalent. It is an acknowledgment of the receipt of the goods, for the purpose of carriage, that they are received of A. B., the shipper, and in the absence of any such words as, "for account and risk of C. D." or "by order or for account of E. F.", the consignee, and in the absence of any terms describing the shipper as an agent, or stating the property to be in another person, no presumption can arise in favor of any other party. It is an admission on the part of the shipowner, that he has received the goods from the shipper, and that the possession came to him from the shipper ; that he is the owner, or has the power of an owner, and has a right to direct the destination of the goods, and has good right to contract with the shipowner for their safe carriage.

The obligation on the part of the shipowner is expressed in these words, after acknowledging the receipt of the goods, "and to be delivered in like good order and condition, at," &c. When a party, for a valuable consideration, receives the goods of another, and has the exclusive possession of them for a special purpose, and then declares that they are to be delivered, &c., it is a promise that he will do the act, or cause it to be done, because he alone has the custody of them and can do it ; therefore this is the necessary effect of the language used.

The general rule of law is expressed by Lord Loughborough, in delivering the opinion of the court of exchequer chamber in the case of *Mason v. Lickbarrow*, 1 H. Bl. 359. "A bill of lading is the written evidence of a contract, for the carriage and delivery of goods sent by sea, for a certain freight. It is a contract of bailment ; and in the usual form of the contract, the

undertaking is to deliver to the order or assigns of the shipper. By the delivery on board, the shipmaster acquires a special property," &c. "The general property remains with the shipper until he has disposed of it by some act sufficient in law to transfer the property. The indorsement of the bill of lading is simply a direction of the delivery of the goods."

In considering the nature and effect of a bill of lading, as an original written contract for the carriage of goods, it may be well to consider how far the construction and legal effect of this instrument may be affected by evidence *aliunde*.

In the case of *Bates v. Todd*, 1 M. & Rob. 106, it was held by Chief Justice Tindal, that evidence *aliunde* might be admitted to show, where a bill of lading had acknowledged the receipt of eight hundred and ninety bags, that seven hundred and ninety bags only were in fact shipped, and that the bill of lading was not conclusive. The learned judge held that, as between the original parties, the bill of lading was merely a receipt, liable to be opened by evidence of the real facts.

In *Berkley v. Watling*, 7 Ad. & El. 29, in a suit brought by the holder of a bill of lading, the goods, as by bill of lading, appeared to have been shipped by Watling. Evidence *aliunde* was admitted to show who was the real shipper. And in the same case, the court, by their remarks, intimated that if it had been shown that Watling, the shipper, was in fact the plaintiff's agent, or that Watling shipped them by his order, the case might have been different, implying that such evidence would be admissible.

Perhaps it is not necessary, in the present case, to determine how far, and to what extent, parol evidence would be admitted to control the meaning and intent of the parties, in the terms which constitute their agreement. But we think it is competent, as in case of a receipt, to control the amount received, as it is, even in case of an instrument under seal, in controlling the admission of the receipt of the consideration. And further, we think evidence *aliunde* is admissible to prove facts not inconsistent with the terms of the written instrument. As, for instance, where the bill of lading imports "shipped by A. B.," it

may be shown that A. B. was the agent of C. D., or that the goods were shipped by his order, or for his use, because not inconsistent with the fact, that the actual shipper did make the contract, and made it in his own name.

In discussing this question, therefore, and in deciding who was the proper party to bring this suit, it seems to us, that we may with propriety take into consideration the facts as stated in this case, in connection with the bill of lading, as competent evidence, not for the purpose of proving a parol agreement, different from that expressed in writing, or that the parties meant and intended something different; but to prove the relations in which they stood, and the circumstances by which they were surrounded, in order to give full effect to the terms of the instrument.

In resorting to the usual sources of information on this subject, the decisions of courts of law, we think it will appear that there has been much doubt and uncertainty, and perhaps some conflict of judicial opinion, upon the question who shall maintain the action against a carrier for damage to goods carried for hire. Sometimes it has been supposed to depend on the question, who is, at the time, the owner of the goods, for damage to which the action is brought; at others, great stress has been laid on the question, who was to pay the freight; and the question, who were the parties to the contract, and the nature of that contract, have not been sufficiently regarded.

In a very early case, before Lord Mansfield, *Davis v. James*, 5 Bur. 2680, which, however, was against a common carrier by land, the case seems to have been put on the right footing, that of original contract. It was placed on the ground that the defendants were liable for the consequences to the original consignors, whether the property was in them or not, because the carrier agreed with them to carry the goods safely, and the action was for the breach of that agreement.

But not long after, the case of *Dawes v. Peck*, 8 T. R. 330, came before the court, was much discussed, and has long been considered a leading case. It was there rather emphatically stated by Lord Kenyon, that the party in whom the legal

interest is vested is the proper party to an action against a carrier; "for he is the person who has sustained the loss by the negligence of the carrier; and whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured." This was followed by many cases, decided on the same grounds, and recognizing the case of *Dawes v. Peck* as an authority. It is true, that was a case of carriage by land, where it is usual to pay the freight or price of carriage in advance, on booking the goods, at the wagon office, and where no bill of lading is usually given, and this perhaps may account for the difference.

Either yielding to the authority of this class of cases, or for some other causes, few cases are found in the books, at that time and for some years after, where the action against the carrier was brought by the shipper, even for goods carried by sea, where there was a bill of lading, and where it was stated in the bill of lading, that the goods were consigned to a person named. But we think this fact can easily be accounted for by the nature of the transaction. There is no doubt that the party, who was owner at the time, or becomes owner of the goods afterwards, by assignment of the shipper or otherwise, and who was consignee, indorsee of the bill of lading, or lawful holder of a bill of lading in blank, and who really sustains the damage, may maintain an action against the shipowner, not because he has any contract with him for the carriage, but because the shipowner has the goods lawfully in his possession; it has become his duty to carry them safely, and deliver them to the consignee, subject only to a lien for his freight; and if the consignee is ready to discharge that lien by a payment or tender of that freight, the refusal of the carrier to deliver the goods to such consignee is a breach of duty, and a wrong done him, for which an action, either in tort for the conversion, or in assumpsit upon the implied promise to perform such duty, may be maintained. So in all cases where it is shown that the consignor was the agent of the consignee, and shipped the goods for his account, or by his order.

But it does not follow, because a third party, not appearing

on the bill of lading, either as the principal for whom the shipper acted as agent, or as the owner of goods damaged by the breach of duty of the carrier, can maintain an action, that the shipper cannot maintain an action on his original contract.

One test question in such case seems often to have been, who is to pay the freight? and it has been supposed that the right to bring the action depends, to some extent, on determining this question. We suppose the question to have presented itself thus: The contract to carry, and the contract to pay freight for the carriage, are considerations for each other; if therefore there is no contract on the part of the shipper to pay the freight, the promise on the other side is made on no consideration moving from him, the promise to him is *nudum pactum*, and no action lies. There would be much ground to sustain this conclusion, if the premises were sound. But we are of opinion that, upon the ordinary contract of shipment, manifested by a bill of lading, made by one party and accepted by the other, it is a contract in the nature of a deed poll, mutual obligations arise between the contracting parties, on the one side to carry the goods, and on the other to pay the stipulated compensation for that service; that these are mutual considerations for each other, and make them legal obligations on which actions will lie.

In the ordinary form of a bill of lading, there is no express stipulation on the part of the shipper to pay freight, but his liability results from having engaged the shipowner to take on board and carry the goods at his instance. This, we think, is well settled both upon principle and authority.

In point of fact, we think it seldom happens, in case of carriage of goods by sea, that the consignor does pay the freight, either in advance or ultimately, and this, perhaps, has led to a doubt, whether a shipper, without proof of other interest or property in the goods, is liable for freight. The reasons why a shipper does not often, in fact, pay freight are obvious.

In the first place, freight is not payable, unless the goods arrive at the place of destination. If they are lost by perils of the sea, whilst the owner stands to the loss of the goods, the carrier loses his freight. Freight is therefore seldom paid in advance.

Again, the carrier has a lien on the goods, which is commonly a much better security for his freight than the personal liability of the shipper or anybody else. The consignee, in paying the freight, to discharge this lien, discharges at the same time the liability of the shipper, and exonerates him.

And further, a bill of lading making the goods deliverable to a consignee or his order, contains a stipulation to this effect "he or they paying freight for the same." This is inserted for the benefit of the shipper, as if it were, "if or on condition that he or they pay the freight." Now, if a consignee or indorsee, holding and presenting such a bill of lading, requiring such a conditional delivery of the goods, receives the goods, without payment of freight precisely at the moment of delivery—as it would be difficult to know what the freight would amount to, until all the goods were out, and it would be inconvenient to require payment at the delivery of each bale—such acceptance of the goods, under such a claim, is evidence of a promise on the part of the consignee to pay the freight, upon which, if not rebutted by other proof, an action will lie. But this is to be regarded as a new and original cause of action, arising upon a demand and receipt of goods, subject to a lien, and received on such condition. *Cock v. Taylor*, 13 East, 399.

In an early case, it was held to be a good custom of merchants, that if a merchant abroad shipped goods to a merchant in London, and the master signed a bill of lading, the merchant in London should be liable for the freight. *Roberts v. Holt*, 2 Show. 443. It seems difficult to find any legal principle upon which a person can be charged by a contract to which he was neither party nor privy, by himself or agent, and which he has not, by his acceptance or other act, adopted or ratified; and we believe that, as a legal authority, this case has not been followed. But it is one amongst the reasons tending to show why, for some cause, parties other than the shipper have usually paid the freight of goods carried by sea, and for which the usual bill of lading has been given by the master for the shipowners, and why there have been but few cases in which the question, who are the original parties to the contract created by the bill

of lading, has been considered. These considerations, we think, will account for most of the cases, in which actions have been held to lie, by persons interested, other than parties to the original contract of carriage.

But whatever doubts may have at times existed, it seems to be settled by authority, that an action will lie by the shipowner against the original shipper for freight on the original contract, where freight has not been received from some other party, or where the shipowner has not lost his right by some act or omission in his own wrong.

In the case of *Moore v. Wilson*, 1 T. R. 659, it was alleged in the declaration, that the carrier undertook to transport the goods "for a certain hire and reward, to be paid by the plaintiffs," who were the consignors. It was proved at the trial, that the consignee had agreed with the plaintiffs to pay for the carriage. It was insisted that this was a variance, the judge so held, and the plaintiff was nonsuit. On a motion for a new trial, Buller, J., who had ordered the nonsuit, admitted that he was mistaken in point of law; and stated that, "whatever might be the contract between the vendee and the vendor, the agreement for the carriage was between the carrier and the vendor, the latter of whom was by law liable." And it was so held by the court.

The case of *Domett v. Beckford*, 5 B. & Ad. 521, was a suit by the shipowner against the shipper on a bill of lading, entered into by his agent, by which goods were shipped from Jamaica to London, to consignees named, "or to their assigns, paying freight," but delivered without receiving the freight, and the consignees becoming bankrupt, this action was held to lie against the shipper. It was a fact, however, in this case, that the shipper was owner.

Strong v. Hart, 6 B. & C. 160, was an action by a shipowner against the shipper, where the master had received a bill of exchange for his freight, which bill of exchange was dishonored; it was held, that if he took the bill instead of cash, of the consignees, for his own accommodation, it was a payment which exonerated the consignors, but if he took the bill because he could not get payment in cash, the shippers would have been liable on their original contract.

The result is, that the contract for carriage is between shipper and shipowner, and that an action for damage to the goods, or nondelivery thereof, on the contract, must regularly be brought by the shipper; or if in fact he be acting as an agent for another person not named in the bill of lading, then by such principal, on the contract made in his behalf; and that where any action is held to lie, by any other person, for damage to the goods, it is through some derivative, incidental or collateral promise or duty, and not on the original promise and undertaking for their safe carriage.

But without reviewing all the cases, which are numerous, we think the subject has been much discussed, and put on its proper footing by several modern cases, the leading one of which is that of *Sanders v. Vanzeller*, 4 Ad. & El. N. R. 260, first adjudged in the queen's bench, on a special verdict, and afterwards in error in the exchequer chamber. It was elaborately discussed, and almost every English case, bearing upon the question, was cited by counsel. It was an action brought by a shipowner against the indorsee of the bill of lading, who had demanded and received the goods under and by virtue of such bill of lading. There had been an instrument of charter party not under seal, between the original shippers and the shipowners, to which reference for a particular purpose was had in the bill of lading; but it was decided, by a majority of the court, upon the effect of the delivery of the goods to the defendants as indorsees of the bill of lading, without reference to the contract of charter. It involved the question of the nature and effect of a bill of lading, and the contract created by it. It was conceded by the counsel on both sides, that this instrument created an original contract between the shipowner and the shipper, the former to carry the goods, the latter to pay the stipulated freight. And whenever a case was cited, suggesting any doubt on that subject, the judges, by their remarks, intimated, that whatever doubts may have before existed, the law must now be taken as so settled. It was decided, that the action against the indorsee of the bill of lading, who had accepted and taken the goods without payment of freight, would not lie; not on the original

contract to pay freight, because the defendants were not parties to it; not on an implied contract, because the law raised no promise by implication against a consignee or indorsee of the bill of lading. It was conceded on all hands, that the acceptance of goods, under a bill of lading in usual form, "he or they paying freight," was a fact tending to establish a new and original promise to pay the freight, and from which such promise might be inferred, but it was an inference of fact only, capable of being rebutted or corroborated by other evidence, all which it would be proper to submit to a jury, to enable them to draw the inference. But it was held not sufficient to sustain the action in that case, because, as matter of evidence, it had not been submitted to a jury, but came before the court on a special verdict, where the court did not feel authorized to go beyond the facts actually found, or to draw any inference of fact from the evidence stated in the verdict. It turned on a legal distinction, narrow but well defined, between a fact from which the law implies a promise, and evidence, tending to prove a fact, from which, when proved to the satisfaction of a jury, a promise is implied by law.

But if neither consignee, indorsee of the bill of lading nor other party is liable for the freight, except by some agreement made or act done, after the original contract entered into, it seems to follow, as a necessary consequence, that by force of that original contract, the consignor or shipper is originally liable. And why, upon principle, should this not be so? Suppose the shipowner, engaged and retained by the shipper in his own name, has carried the goods safely to the place of destination, landed them, and is ready to deliver them to the holder of the bill of lading, on payment of his freight; but neither the shipper, nor any one having a right under the bill of lading to receive them, is there, and a holder of the bill of lading, on account of the depreciation of the market value of the goods, or other cause, does not choose to pay the freight and receive the goods; has not the shipowner done his whole duty, performed his entire contract, and become entitled to his freight, by virtue of his contract; and is not the shipper, by force of his part of the contract, bound to pay it?

It seems to be thus well established, that a bill of lading is a written simple contract, between a shipper of goods and a shipowner, the latter to carry the goods and the former to pay the stipulated compensation for that service. We have seen that by its original terms, or by any assignment or indorsement of it, it does not create any obligation on the part of the consignee named, or any assignee or indorsee, to pay the freight; but if either of these parties does become liable for freight, it is by some after act, or express or implied agreement. It follows, as a necessary legal consequence, that the shipper is bound to pay the freight.

But though we have considered it important to establish the point that the original shipper and consignor is liable to pay freight, because it establishes the privity of contract between these parties, and the mutuality of the contract, it is not the precise question in the present case.

It appears to us, that the true rule which must govern the present case, is laid down by Lord Ellenborough, in the case of *Joseph v. Knox*, 3 Campb. 320. That was an action by shipper against shipowner on a bill of lading, in which it was contended that the action would not lie, because the plaintiff did not appear to be the owner of the goods. But Lord Ellenborough held, that the action well lay, on the privity of contract established between the parties, by means of the bill of lading. The plaintiff was the party from whom the consideration moved, and to whom the promise was made. After such a bill of lading, the shipowner cannot say to the shippers, they have no interest in the goods, and are not damnified by the breach of contract.

The same rule, we think, was recognized and affirmed in the case of *Sargent v. Morris*, 3 B. & Ald. 277. The principle decided is this; that the original contract for carriage of goods by sea, is made between the shipowner and the shipper, and that by force of such contract, if the goods are not carried safely, an action lies by the shipper. The case was very much like the one under consideration, except that the action for damage done the goods was brought by the consignee, and not by the con-

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signor and shipper. It was an action on the contract, to recover damage of the shipowner, caused by bad stowage and other negligence and misconduct. The goods were shipped by Bayo & Son, at Seville, and a bill of lading given by the master, making them deliverable to the plaintiff, in London, he paying freight. The court remark, that it was left equivocal upon the bill of lading, whether the goods were owned by the shipper or by the consignee; but that it appeared by other evidence that the goods were the property of the shipper, and consigned to the plaintiff for sale on the shipper's account. The plaintiff, on advice of the shipment, had caused the goods to be insured, paid premiums of insurance and freight. But the court decided that the consignee could not maintain the action; not on the contract, for he was not a party to it; nor as owner, because the property had not vested in him by an actual delivery; but that the action should have been brought in the name of Bayo & Son. And the court place their judgment on the ground that the shippers were the party with whom the contract of the shipowner was made, and who had the right to enforce it by an action. Abbott, C. J., drew the distinction between that case, which was for breach of the undertaking of the shipowner to carry safely, and a case where the goods have vested in the consignee, on which an action in another form might have been brought; and he remarks, "A transfer of the property is however very different from a transfer of the contract." Mr. Justice Bayley expressly puts it on the ground of special contract.

A similar rule had been previously adopted in the case of *Waring v. Cox*, 1 Campb. 369, before Lord Ellenborough, in a case where the plaintiff claimed as indorsee of a bill of lading, without proof that the indorser had paid value for the goods. Lord Ellenborough, in that case, said: "The right to stop goods *in transitu* is a personal right of the seller, and cannot be thus assigned to another. In this case the action, if maintainable at all, should have been brought, not in the name of the agent, but of the consignor himself." And the reporter (Campbell) adds, in a note: "In this case the promise contained in the bill of lading

was made, not to the plaintiff, but to a third person, viz. the consignor of the goods. The plaintiff was not privy to it, and there was no consideration for it moving from him to the defendant; for which reason a breach of it could afford him no cause of action."

In a recent case in the house of lords, it was decided, that where the property has vested in the consignee, it is proper for him to bring the action; yet, where the consignor has made a special contract for the carriage, he is liable for the freight, and may maintain an action against the shipowner, if the goods are lost or damaged whilst in his charge. Though that was a Scotch case, it was distinctly stated, that, upon this subject, the law of Scotland coincided with the English law. *Dunlop v. Lambert*, 6 Cl. & Fin. 600.

In that case, the lord chancellor, in announcing the opinion of the house of lords, after reviewing the authorities, said: "These authorities establish the proposition, that although, generally speaking, where there is a delivery to a carrier, to deliver to a consignee, he is the proper person to bring the action; yet if the consignor made a special contract with the carrier, the special contract supersedes the necessity of showing the ownership in the goods, and the consignor, the person making the contract with the carrier, may maintain the action, though the goods may be the goods of the consignee. 6 Cl. & Fin. 626, 627.

These determinations show, that though other persons may have derivative rights under a shipment, and bill of lading of goods shipped, yet they depend on different grounds and principles, from that of the original contract for carriage and the payment of freight.

It has sometimes been insisted, that a bill of lading is negotiable, like a bill of exchange, so that when the shipper has indorsed and delivered the bill of lading, his whole right and interest, as well in the contract as in the goods represented by it, is gone. Something like this has been suggested in some of the earlier cases, of *Lickbarrow v. Mason*, and others, but has never, we believe, received the sanction of judicial decision.

But it is now fully settled, that a bill of lading is not negotia

ble in the sense stated, so as to constitute a legal obligation between the shipowner and the indorsee; though in many cases of the indorsement of the bill of lading, whilst the goods are in the possession of the carrier, of which the shipper is owner, or the goods have been shipped on his account, the effect is to transfer the right of possession connected with the right of property, in virtue of which, as before stated, the indorsee may have his remedy as owner. But, in law, the original contract of the carrier, with the shipowner, is like any other right or chose in action; it may convey an equitable interest, but cannot transfer the legal right of action.

This question came directly before the court in a comparatively recent case, *Thomson v. Dominy*, 14 M. & W. 403, in which it was held, that a bill of lading is not negotiable like a bill of exchange, to enable an indorser to sue in his own name; the effect of the indorsement being only to transfer the property in the goods, but not the contract itself. It was put expressly on the ground, that the original contract for safe carriage is with the shipper, and that contract is not transferable, although an indorsement of the bill of lading, by the consignee, who has in himself the right of property in the goods, will pass the right of property to the indorsee, with all the rights incident thereto. Since that decision, by an act of parliament, *St.* 18 & 19 Vict. c. 111, a bill of lading has in effect been made transferable by indorsement, so that an action may be brought upon it in the name of the indorsee. This statute, of course, cannot affect the law of America.

The legal conclusion to be drawn from this view of the nature and character of a bill of lading is, that these plaintiffs, as shippers named in the bill of lading, and with whom the original contract for safe carriage was made, have not ceased to be the party contracted with by the defendants, by directing the goods to be delivered to Gaines & Co.; nor would they have ceased to be such party if the bill of lading had in terms made the goods deliverable to their own order, and they had indorsed it to Gaines & Co., or to any other person. The contract for safe carriage, on their promise to pay the freight, still remained a

legal and valid contract of the defendants; and if the beneficial interest in the damages to be recovered is in Griffiths & Co., the owners of the goods, whose agents and attorneys the plaintiffs were, and who made the contract of shipment by their authority and for their benefit, the plaintiffs must be deemed to be trustees for their employers, and will be accountable to them accordingly.

In the case of *Barker v. Havens*, 17 Johns. 23, an action was maintained by the shipowner against the shipper and consignor, for the freight of cotton, on the ground of the contract created by the bill of lading, and the stipulation therein for the payment of freight. The court, in their opinion, lay some stress on the fact, that the shipper was the owner of the goods, and the contract was for the carriage of his own goods. But it seems to be thus stated, not because he would not be liable on this contract, if the property was not in himself; but to enforce the duty of the master, when the goods are deliverable only on payment of freight, not to deliver the goods without payment of the freight, so as to exempt the consignor from liability on his contract, when the consignee or any other person is owner.

The only remaining question is, whether the action ought to have been brought by Griffiths & Co., the owners of the goods, for whose account and risk they were shipped. The facts are now clearly established, that Griffiths & Co. had bought and paid for the goods; that no right of stoppage *in transitu* ever existed or was ever claimed; that the plaintiffs made the shipment by the order and request of Griffiths & Co. and as their agents; that Gaines & Co., consignees at New Orleans, were merely the forwarding agents of Griffiths & Co., and that they had no property or interest in the goods. The contract of shipment, therefore, was made by the plaintiffs as the agents of Griffiths & Co., whose names were not mentioned. The question is not whether Griffiths & Co., as principals, might not maintain an action on a contract made for their account by their agent; but whether the plaintiffs, as the party actually making the contract, in the absence of any action brought by the principal, may not maintain the action.

It is quite certain, that if the plaintiffs had been called upon for the freight, in case it had not been paid by the consignee on delivery of the goods from the ship, it would have been no answer to say, and to prove that they acted as agents in making the contract. They were bound. *Higgins v. Senior*, 8 M. & W. 834.

The result of the cases, as laid down in Sergeant Shee's edition of Abbott on Shipping, 337, is this: "In the case of an express contract, evidenced by a bill of lading, the action may be brought by the shipper with whom the master contracted, or by the owner of the goods, whose agent the shipper was."

In the case of *Sargent v. Morris*, before cited, Mr. Justice Bayley says: "Now I take the rule to be this; if an agent acts for me and in my behalf, but in his own name, then, inasmuch as he is the person with whom the contract is made, it is no answer to an action in his name, to say that he is merely an agent, unless you can also show that he is prohibited from carrying on that action by the person on whose behalf the contract was made. In such cases, however, you may bring your action, either in the name of the party by whom the contract was made, or of the party for whom the contract was made." 3 B. & Ald. 280, 281.

In case of a written contract made by an agent in his own name, although the other party may prove the agency so as to charge the principal as the real party, yet he may also charge the agent. *Jones v. Littledale*, 6 Ad. & El. 486.

The same principle is stated in *Sims v. Bond*, 5 B. & Ad. 393. The court say: "It is a well established rule of law, that where a contract, not under seal, is made with an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it; the defendant, in the latter case, being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party."

So in *Fragano v. Long*, 4 B. & C. 219, an action was brought in the name of the owner of the goods, to whom they were consigned, on the ground that the property was vested in him;

and he sustained an action, on the ground that the principal, though not known to the carrier, may sue on a contract made by his agent, although, as said by Bayley, J., there might have been some difficulty if the agents who made the contract had set up an adverse interest. So in New York. *Dow v. Cobb*, 12 Barb. 310.

The same principle was laid down, where a broker had made a purchase in his own name, for a principal not named; it was held that either might have the action. *Short v. Spackman*, 2 B. & Ad. 962.

It does not appear in the present case, that the owners of the goods have ever made any objection to the maintenance of this action by the plaintiffs. On the contrary, we understand that it was commenced and is prosecuted with their knowledge and consent, and for their benefit. And the court are of opinion that this action can be maintained by the plaintiffs, being the original shippers and consignors in the bill of lading, by force of the original contract for safe carriage, made by the defendants with them; and it is not for the defendants to say that, upon a breach of that contract, the plaintiffs, with whom it was made, are not entitled to recover the damages, which are the direct and natural consequence of such breach of contract.

Case to stand for trial.

S. Bartlett & H. Ritchie, for the plaintiffs, besides some of the cases mentioned in the opinion, cited Beawes *Lex Mercatoria*, (5th ed.) 142; *Creery v. Holly*, 14 Wend. 26; *Covill v. Hill*, 4 Denio, 330; *Wolfe v. Myers*, 3 Sandf. 7; 1 Greenl. Ev. § 305; *Merian v. Funck*, 4 Denio, 110; *Amos v. Temperley*, 8 M. & W. 798; *Scaife v. Tobin*, 3 B. & Ad. 523; *Atkinson on Shipping*, 117; *Carter v. Graves*, 9 Yerg. 446; *Freeman v. Birch*, 1 Nev. & Man. 420; *Evans v. Marlett*, 1 Ld. Raym. 271; 1 Dane Ab. 475; *Griffith v. Ingledew*, 6 S. & R. 429; *Arfridson v. Ladd*, 12 Mass. 173; *Savage v. Rix*, 9 N. H. 269, 270; *Dutton v. Poole*, 2 Lev. 210; *Rippon v. Norton*, Cro. Eliz. 849, 881; *Levet v. Hawes*, Cro. Eliz. 619, 652; *Layng v. Stewart*, 1 W. & S. 222; *Lickbarrow v. Mason*, 2 T. R. 63; *Story on Agency*, §§ 155, 160, 396; *Stackpole v. Arnold*, 11 Mass. 29; *Doe v. Thompson*, 2 Fos-

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ter, 217; 1 Amer. Lead. Cas. (1st ed.) 460; *Buffum v. Chadwick*, 8 Mass. 103; *Van Staphorst v. Pearce*, 4 Mass. 263; *Clap v. Day*, 2 Greenl. 307; *Piggott v. Thompson*, 3 Bos. & Pul. 147; *Commercial Bank v. French*, 21 Pick. 486; *Williams v. Millington*, 1 H. Bl. 81; Paley on Agency, c. 5; Addison on Con. (1st ed.) 782; Angell on Carriers, § 397; *Collins v. Union Transportation Co.* 10 Watts, 384.

A. H. Fiske, for the defendants, contended that delivery to a carrier, whether evidenced by a bill of lading or not, vests the property in the consignee, who ought therefore (except in the few special cases hereafter mentioned) to sue for any injury happening to the goods shipped; that the bill of lading is first to be looked to as the medium of the intent of the parties; that in the ordinary form of the bill of lading, (as in this case,) the property *prima facie* vests in the consignee, and he alone is entitled to sue; though if it appears by the bill of lading, or by extrinsic evidence, that the property described therein is shipped on account of the consignor, or at his risk, or he pays the freight thereon, or makes a special contract for carriage, then there is established a privity of contract between him and the carrier, and the contract of carriage is presumed to be with him, and he may sue; *Snee v. Prescott*, 1 Atk. 248; *Evans v. Marlett*, 1 Ld. Raym. 271; *Dawes v. Peck*, 8 T. R. 330; *Dutton v. Solomson*, 3 Bos. & Pul. 582; *Brown v. Hodgson*, 2 Campb. 36; *Fragano v. Long*, 4 B. & C. 219; *Potter v. Lansing*, 1 Johns. 215; *Griffith v. Ingledew*, 6 S. & R. 429; *D'Anjou v. Deagle*, 3 Har. & Johns. 206; *Grover v. Brien*, 8 How. 439; *Lawrence v. Minturn*, 17 How. 100; Morton on Vendors, 416; 1 Walford on Parties, 31 & seq.; *Lickbarrow v. Mason*, 6 East, 21, note; *Chandler v. Sprague*, 5 Met. 306; and that the only excepted cases are these: (1.) When the shipper or consignor pays the freight, or makes a special contract; 5 Bur. 2680; 1 T. R. 659; 3 Campb. 320; 6 Cl. & Fin. 600. (2.) When the consignor or shipper retains the property in the goods; 3 B. & Ald. 277; 5 B. & Ald. 350; 1 M. & Rob. 223. (3.) Where the consignor and consignee are both interested in the goods, as in case of bailor and bailee. 1 Nev. & Man. 420.

PEOPLE'S FERRY COMPANY vs. EBENEZER H. BALCH.

Upon a contract in writing, by which the subscribers "agree to pay the sums set against their respective names, to such persons as shall be authorized to receive the same, for the establishment and support of a new ferry from East Boston to Boston, the location of which shall be determined by the committee recently appointed at a meeting of the citizens; provided sufficient is subscribed for the purpose; the same to be represented by the certificates of stock to be created by the company hereafter to be organized," a corporation, established after the date of the agreement, cannot maintain an action against one who subscribes it after such organization, for the amount of his subscription, at least until a sufficient sum has been subscribed to pay for all lands, structures and boats of the ferry, free of incumbrances.

ACTION OF CONTRACT by a corporation, established by St. 1853, c. 422, passed on the 25th of May 1853, to recover \$500, being the amount of the defendant's subscription to the following agreement in writing: "We, the undersigned, agree to pay the sums set against our respective names, to such persons as shall be authorized to receive the same, for the establishment and support of a new ferry from East Boston to Boston, the location of which shall be determined by the committee recently appointed at a meeting of the citizens; provided sufficient is subscribed for the purpose; the same to be represented by the certificates of stock to be created by the company hereafter to be organized. East Boston, January 1st 1853."

At the trial in the superior court, at January term 1856, before *Huntington, J.*, it appeared that this agreement was signed by the defendant in June 1854, but by some of the other subscribers in the winter of 1853, before the plaintiffs obtained their act of incorporation; that the plaintiffs organized as a corporation in July 1853, and established by-laws, one of which provided that the capital stock should be divided into shares of twenty five dollars each, the whole of which should be paid in at the issuing of the certificates, and should not afterwards be subject to any assessments; that the only assessments ever made upon the capital stock, were sixteen per cent. in August 1853, sixty per cent. in October 1853, and twenty four per cent. in June 1854. It did not appear how much stock was subscribed for before the

organization, or that the defendant ever had notice of any of the assessments ; but payment of the defendant's subscription was demanded of him, and refused.

It appeared that in 1853 and the early part of 1854 the plaintiffs purchased and took land for their landing places, made contracts for the building of their boats, drops and slips, and for doing all other work necessary to complete the ferry, at an expense, in all, of \$265,200. It did not appear that any plans were changed, or new contracts made, after or in consequence of the defendant's subscription. But the work was carried on vigorously from that time, according to the original plans, and the ferry was opened in October 1854.

There was evidence tending to show that the defendant, about a month before signing, was called on, by one of the directors, to subscribe to stock of the People's Ferry, and refused to do so till he could look into the matter ; and that the understanding was, that he should do so, and give his answer to that director when he next saw him. But there was no direct evidence that the defendant, when he signed the agreement, knew of the charter, or of anything that had been done by the plaintiffs under it, or in regard to the ferry ; and no evidence that the defendant ever attended any of the meetings of the stockholders, or took any part in the doings of the company.

The corporation did not, at any meeting, authorize any form of agreement for subscription, but the books which had been used before the charter were afterwards continued and circulated by the directors, and the subscribers so obtained were treated as subscribers by the plaintiffs, and many of them paid for and took their stock, and the subscription books had ever since been in the custody of the officers of the company, as belonging to them. The nominal amount of subscriptions contained in these books was about \$153,000, and, including some verbal agreements to take stock, did not exceed \$175,000. There was no evidence that the amount of the capital stock of the company had been fixed by any vote of the directors or stockholders.

Upon the evidence introduced, (of which so much is above

stated as is material to the understanding of the questions decided by this court,) the defendant contended that this action could not be maintained, because,

1st. The plaintiffs were not a party to the contract; that its terms excluded them, and that it was not competent for the plaintiffs to contradict, vary or explain the written contract by parol, and show that the plaintiffs were the company intended

2d. The contract was without consideration.

3d. There was no mutuality in the contract.

The court instructed the jury, "that it was competent for the plaintiffs to show that the writing was signed by the defendant at a time other than its date; that, on the question of mutuality, it was necessary that the minds of the contracting parties should meet; that upon the terms of this subscription paper, the amounts being payable to persons to be authorized to receive it, a contract to pay the plaintiffs might be implied, taken in connection with the evidence in the case; that the corporation could adopt and ratify the contracts of subscriptions, and the plaintiffs claimed there was evidence tending to show this; that if the plaintiffs were authorized to collect these subscriptions, and were the beneficial owners at the time of the defendant's subscription, and he never revoked the same, and if the subscription paper was presented to the defendant by a person duly authorized by the plaintiffs to obtain subscriptions, and if the defendant, for a consideration good in law, knowing that he was dealing with an agent of the plaintiffs, put his name to the paper, intending to become an associate in the corporation, and the plaintiffs adopted the subscription, expended moneys, made contracts, purchases and outlays, and incurred liabilities, for the purpose of establishing and supporting a ferry, as set forth in the articles of subscription, and if the plaintiffs had also adopted and ratified the other subscriptions, then existing, as well as the defendant's, it would be sufficient in law to create a contract, so far as mutuality is required; that, as to the consideration, the general rule was, that a benefit to one party, or damage or loss to the other, would constitute a sufficient consideration; that a

consideration might be shown by parol, though not expressed in the instrument; and that payments by other subscribers, the plaintiffs' proceeding with the enterprise, making purchases, incurring expenses, building boats, purchasing real estate, for the purpose of establishing and supporting the ferry, and a readiness to admit the defendant to membership, would constitute a legal consideration."

The defendant also contended that, by the conditions of the agreement, the plaintiffs must show "that a sufficient amount of subscriptions for stock, genuine *bona fide* subscriptions, was obtained to establish and support the ferry, without a resort to credit." The plaintiffs contended that a determination or decision by the corporation or their directors, that a sufficient sum had been raised to establish and support a ferry, was conclusive upon the defendant; that the success of the enterprise was evidence of it. And they offered to show that the board of directors had so resolved; but it did not appear to have been done at a meeting of the board.

The court ruled "that this provision in the subscription paper was a condition precedent; that the plaintiffs or their directors were not, so far as related to the liability of the defendant, the tribunal to determine whether a sufficient sum had been raised; that the jury must be satisfied that written subscriptions sufficient were obtained at the time of the demand made upon the defendant for payment; that what sum was sufficient was a question of fact for them to determine; and it was submitted to them, whether it should not be such sum as men of ordinary caution, prudence and sagacity, with competent knowledge of the nature and character of the enterprise, and applying these qualities to the subject matter in hand, would deem necessary to establish and maintain a ferry at the place designated by the charter and contract; that the subsequent success or failure of the enterprise would not be a controlling element in deciding upon the question of sufficiency; that it was not to be taken that the corporation were never to use their credit or borrow, but such a sum was to be raised as would place the corporation out of the reach of those fluctuations which attend a business

done on mere credit, and which, in certain states of the money market, operate to check or put a stop to the enterprise; and that, in the different and conflicting results and amounts arrived at by each side from the books and evidence, they must examine carefully for themselves in deciding upon the sufficiency of the sum raised to comply with the condition."

The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

A. A. Ranney, for the defendant, cited *Chester Glass Co. v. Dewey*, 16 Mass. 94; *Atlantic Cotton Mills v. Abbott*, 9 Cush. 423; *Ives v. Sterling*, 6 Met. 310; *Phillips Limerick Academy v. Davis*, 11 Mass. 113; *Machias Hotel v. Coyle*, 35 Maine, 405; *Istone v. Frankfort Bridge*, 2 Bibb, 570; *Wallingford Manuf. Co. v. Fox*, 12 Verm. 304; *New Bedford & Bridgewater Turnpike v. Adams*, 8 Mass. 138; *Essex Turnpike v. Collins*, 8 Mass. 292; *Bridgewater Academy v. Gilbert*, 2 Pick. 579; *Hamilton College v. Stewart*, 1 Comst. 581; *Middlebury College v. Williamson*, 1 Verm. 212; *Middlebury College v. Loomis*, 1 Verm. 189; *Foxcroft Academy v. Favor*, 4 Greenl. 383.

R. Choate & B. F. Russell, for the plaintiffs. On a promise to pay money to a corporation, or to whomsoever may be appointed to receive it, any corporation or appointee subsequently created may sue, unless the defendant notifies his intention not to be bound. *Thompson v. Page*, 1 Met. 565. *Ives v. Sterling*, 6 Met. 310. *Bryant v. Eastman*, 7 Cush. 114. *Watkins v. Eames*, 9 Cush. 537. *Chester Glass Co. v. Dewey*, 16 Mass. 94. *Northern Railroad v. Miller*, 10 Barb. 260. 2 Parsons on Con. 61. Offers of reward and notes payable to bearer are familiar examples of this rule. Parol evidence is admissible for the purpose of showing that the plaintiffs are the party intended at the time of the contract, and have been brought into existence in the mode then contemplated. The paper declared on is to be read in the light of the history of the transaction, and the attending circumstances, including its date, and the time of signature. It is a promise made in June 1854, to pay to some one to be appointed after January 1853 by a corporation created after January 1853. It speaks of "certificates of stock to be

created by the company hereafter to be organized," which could only be a corporation — and the promise to pay "such persons as shall be authorized," may well include a corporation. *Rev. Sts. c. 2, § 2, ch. 13.* Does not this paper come within that exceptional class of commercial instruments, which are to be construed by the jury? *Brown v. M'Gran*, 14 Pet. 479. *Etting v. Bank of United States*, 11 Wheat. 59.

The objection of want of mutuality is groundless. There were two contracting parties; each known to the other. The requisites to mutuality were accurately stated by the presiding judge.

The consideration was sufficient. *Holyoke Bank v. Goodman Paper Manuf. Co.* 9 Cush. 579. *Andover Academy v. Cowles*, 6 Pick. 427. *Ives v. Sterling*, 6 Met. 317. *Kennebeck & Portland Railroad v. Jarvis*, 34 Maine, 360. 1 Parsons on Con. 377, 378 & notes.

There was no error in the instructions, relating to the condition precedent of the sufficiency of the subscription, of which the defendant can take advantage. The question of such sufficiency under such a contract is, by the assent of each subscriber, referred to and to be determined by the majority, in will and interest, of the associates; and the defendant, having subscribed after such determination had been made, and the work was in a course of vigorous prosecution by a corporation, was precluded from putting that question to the jury; or this was at least *prima facie* evidence of the sufficiency. *Great Northern Railway v. Kennedy*, 4 Exch. 417. Without resorting to the subscription papers, the sufficiency of funds was shown *prima facie* by the determination of the plaintiff corporation that there was a sufficiency, the successful prosecution of the enterprise, the fact that the greater part of the sums subscribed had been paid in, the actual large receipts of money from the stockholders, and the other evidence in the case. This *prima facie* case the defendant did not undertake to answer. The evidence admitted was competent; and the test of sufficiency stated in the instructions was not laid down as a fixed rule of law, but was a sound and just comment on the evidence, to assist the jury in deciding the question of fact submitted to them.

SHAW, C. J. This is an action brought by the plaintiff corporation, to recover \$500, a subscription towards the stock of a company first associated without an act of incorporation, but which afterwards became regularly incorporated, for the purpose of establishing a ferry from Boston to East Boston.

The first question is, whether this action will lie by this corporation on the subscription paper stated. It is not an action against the defendant for unpaid assessments, as against an actual member of the company; nor an action to recover damage for refusing to become a stockholder and take shares; but upon a promise or executory contract to pay a certain sum of money, to some person authorized to receive the same, for the purpose stated.

The paper is in the words following: "We, the undersigned, agree to pay the sums set against our respective names, to such persons as shall be authorized to receive the same, for the establishment and support of a new ferry from East Boston to Boston, the location of which shall be determined by the committee recently appointed at a meeting of the citizens; provided sufficient is subscribed for the purpose; the same to be represented by the certificates of stock to be created by the company hereafter to be organized. East Boston, January 1st 1853."

The words quoted, including the date, constituted the heading of a subscription book, and the name of the defendant, with the number of shares and the sum, was the genuine signature of the defendant, after other intervening signatures.

It appears that this paper writing, which bears date of the 1st of January 1853, was actually signed by the defendant in June 1854. In the mean time, between these two dates, the circumstances of all parties concerned had greatly changed, as appears from the case stated in the bill of exceptions.

It is extremely difficult to put any satisfactory construction upon such an instrument, or to determine what are the relative obligations and rights of any persons under it. The rule undoubtedly is, that an instrument takes effect from the time of its execution and delivery; and in order to give effect to this rule, it is settled that the date, even of a deed, is not conclusive evi-

dence of the time of execution, and that other evidence may be given of the time of the actual execution. Sometimes the fiction of *nunc pro tunc* may be resorted to, and the party executing on one day may be held as if it had been done on such previous day, where the circumstances remain the same, so that the contract may be carried into effect, consistently with the manifest intentions of the parties. But where great changes have taken place, so that the performance of the contract has become impossible, or where it cannot be carried into effect, so as to accomplish the manifest intent of the parties, such rule will not apply. We will endeavor to consider it under various aspects.

1. Taking this paper as an instrument, whether a contract with anybody or not, executed in June 1854, and taking its effect as of that day, we are of opinion that no action can be maintained upon it by the plaintiff corporation. This company had then become duly incorporated and organized, capable of contracting and being contracted with; and no promise being made to them by their corporate name, or any other, or to any person for their use, they cannot sue upon it. According to the best view which can be taken of it by the plaintiffs, it was a promise to pay a sum of money, as one of a company, for the purpose of establishing a ferry. Such company might become incorporated, as it actually did, in which case it would, in effect, be an undertaking to become a holder of shares to a certain amount, and the obligation he would incur would be that of paying assessments, *pari passu* with other stockholders; whereas all the assessments which could be laid had been laid on those who were stockholders in this corporation, and most of them had been paid. Instead of a stipulation to pay instalments, or to pay, as all other subscribers would be obliged to pay, according to the terms of the subscription paper, it must be construed as an undertaking to pay the whole amount subscribed for, at once. Instead of a promise to pay the sum subscribed to some person to be authorized by the voluntary association therein mentioned, it must operate as a promise to pay an existing corporation.

All the cases, we think, in which it has been held that an

action would lie against a subscriber for stock, were promises to pay to a company when incorporated, so that it might be considered as in the nature of a standing offer to pay such company when incorporated; and such corporation was formed before such offer was revoked, and the company accepted such offer, and received the subscriber as a member of the corporation, when the contract was complete. *New Bedford & Bridgewater Turnpike v. Adams*, 8 Mass. 138. *Essex Turnpike v. Collins*, 8 Mass. 292. Here there was no necessity and no occasion for such a mode of proceeding, because the associates had already formed a corporation, for the express purpose, and with a capacity to make any and all contracts incident to the establishment of their ferry.

2. Regarding this as an instrument made as of January 1853, although in fact executed in June 1854, it was still a written instrument, and the defendant can only be bound according to its terms expressed, or reasonably implied. As such, it contemplated a state of things, which, at the time of its actual execution, had passed away and ceased to exist; it looked to a course of things, which had become impossible. It contemplated the procuring of an act of incorporation, because that was one of the convenient modes of proceeding, to which a voluntary association might and would be likely to resort, to facilitate their proceedings, and to which they did resort, which incorporation should embrace all the associates as members, including the defendant. In the formation of such an act, and fixing its terms, the defendant would have an equal voice with the other associates. It looked to an organization, to a choice of directors, to the laying of assessments, to the determination of the question whether money enough had been subscribed to constitute a sufficient fund to warrant the commencement of the enterprise. Whether this determination should be made by the body of stockholders, or by the directors appointed by them, or in any other way, the terms of the subscription looked to a determination of this question in some mode authorized and directed by the stockholders, on any of which questions all the stockholders would have an equal voice, either *per capita*, or in

proportion to the amounts subscribed. These were powers and privileges which the defendant, by the terms of his undertaking, as an engagement for things to be done at times then future, was to enjoy, in common with all the associates. But these had become utterly impossible by intervening events. The act of incorporation had been obtained, the corporation organized, the directors chosen. With or without any determination by the stockholders, the directors, or otherwise, that funds enough had been subscribed, (no evidence of any such determination anywhere appearing,) the company had made large purchases and contracts, in which it was not possible that the defendant could have any voice, and therefore it was not the contract into which, by a subscription to that paper, he had come.

3. But whether this be regarded as executed on the 1st of January 1853, or in June 1854, and if there were proper parties to make it a contract, it was a written contract to be construed and carried into effect, according to its terms; and, by its terms, it was conditional. The liability of the defendant, either to contribute capital for a joint stock company, or to take shares in an incorporated company, was made to depend on the expressed condition, "that sufficient is subscribed for the purpose." The whole is to be taken together and to have a reasonable construction, according to the intent of the parties. A sufficient amount must be subscribed. It might never be paid, because some might become unable; but it must be an undertaking, received in good faith, on the part of the company or associates, to take and pay for the sums subscribed. A subscription from a party, with an assurance given him that he should not be called upon, or that it should be optional with him, at a future time, whether to take such shares or not, would not be a subscription in good faith, nor satisfy the condition. Again, what is intended in the contract by the word "sufficient"? The expression "sufficient for the purpose," if alone, might be a little equivocal; but it is explained by the previous part of the paper, stating that purpose to be "the establishment and support of a new ferry from East Boston to Boston." This was the enterprise; and the plain effect, probably the actual intent,

was, that no one should be liable to pay or contribute anything until money enough was promised, and at least engaged for, to accomplish this enterprise.

Now, as the capital was to be raised, that is, engaged for, subscribed, before the work could be done, or even conclusively contracted for, this clause constituting the condition precedent, must have been understood by the parties, and must now be construed by the court, to mean a sufficient sum, as estimated by persons of competent skill and judgment, with the aid perhaps of offers, and tenders and provisional contracts, and not the actual cost. Then as to the amount, it must be sufficient, as ascertained by such estimates, to meet the necessary outlay, the purchase of land, the cost of buildings, wharfs, ferry ways and other real estate and fixtures, and for the purchase of suitable and proper boats, with their apparatus. It must be such a sum as, according to a fair estimate, when all the land, fixtures and other property purchased should be paid for, and the contracts of the company fulfilled, and their debts paid, would leave them owners of the property, and free of debt contracted on account of these great and necessary original outlays. The court are therefore of opinion, that it was not a compliance with this condition, that a sufficient sum was in good faith, subscribed, such as, in the opinion of the directors, or of the company, or of the jury now, would lead them to believe that they might, with reasonable safety, begin the enterprise, and afterwards, by the aid of the capital actually subscribed and the prospect of success in its execution, would give them a credit, and enable them to raise money sufficient to proceed and complete the enterprise, and place them above the reach of those fluctuations which attend a business done on mere credit, and which, in certain states of the money market, operate to check or put a stop to the enterprise. This, we think, was not the standard of sufficiency contemplated by this contract; it looked to the raising of a capital stock sufficient to meet the cost, and the payment, by each individual, of an aliquot part of that capital; but the actual sum being then uncertain, such estimated amount was taken, instead of a fixed capital in

money. And this was not a merely formal or technical condition, but it was of the essence of the subscriber's contract, and prescribed limits to his liability. To test this, let us examine its practical operation. Suppose, for instance — assuming these numbers for the mere purpose of illustration — that the whole estimated necessary cost of the ferry should be \$250,000, that sum would stand in the place of a capital expressed in money. Supposing this divided into 10,000 shares, at \$25 each, making the entire capital. The defendant's subscription for twenty shares at \$25 = \$500 would be $\frac{500}{250000}$, or $\frac{1}{500}$ of the entire stock. But if a money capital subscribed of one half of the cost, with a prospect of success in the enterprise, would give them sufficient credit, so that cautious and prudent men might think it safe to make a beginning, trusting to such credit for the other half, then, when \$125,000 were subscribed, they might commence, and must of course go through. The consequence to the defendant would be, that instead of standing responsible for $\frac{1}{500}$ part of this enterprise, and receiving that proportion of the stock, he would stand responsible for $\frac{1}{250}$, or double the amount he engaged for. It would be equivalent to insisting that, though he agreed to take twenty shares, he must take forty. If the enterprise should be a profitable and brilliant one, and the stock above par, this would be no hardship; but in case it should fall below par, as it might, and it is the only case in which the company would have occasion to require him to take his shares, the answer is obvious, such was not his contract. It is analogous, in principle, to the case where the capital is fixed by the act of incorporation, or the articles of association, at a stated sum in money, with a provision that no subscriber shall be holden till that amount is subscribed. *Salem Milldam v. Ropes*, 6 Pick. 23, and 9 Pick. 187.

If, instead of having a sufficient sum subscribed, to cover the estimated cost of the undertaking, they have only enough to enable them, in the judgment of discreet men, to begin the enterprise, say one half, \$125,000, and with their credit for an equal sum to complete it, the result would be, that when the whole of these sums should be paid in as subscribed for,

and appropriated, they would stand indebted, in some form, to the amount of one half of the cost of the works. This is the more significant, because there is a provision in the act of incorporation, *St.* 1853, *c.* 422, § 3, restraining the company from issuing new shares at a rate less than par. There would therefore be no means of paying this debt, but an assessment on the existing stockholders, and even this was prohibited by a by-law. But supposing this by-law to be repealed by the company, and the shares made subject to assessment, the defendant would be liable to double the amount of that for which he would have been liable, if a sufficient amount had been subscribed for, to complete the enterprise, before they begun — contrary to the express condition of his contract.

This principle would not prevent the company from using their credit in making purchases and contracts. It would not be necessary that they should have ready money in all their dealings; but the sum should be such that, when all contracts should be performed, and all real and personal property paid for, and the subscriptions collected, the company should be substantially out of debt, and hold the property free from permanent incumbrances.

An argument, slight perhaps, but tending to the same conclusion, may be drawn from section 9 of the above act, authorizing the City of Boston to purchase this ferry. The city is authorized to purchase the ferry of said company, and all the franchise, property, rights and privileges, by paying them therefor such a sum as will reimburse them the amount of capital paid in, with a net profit, &c. It presupposes that a capital stock shall have been paid in, equal, at least, to the cost; and that the capital stock and the cost of the establishment were equivalent to each other; otherwise the statute would countenance the monstrous proposition, that the city might purchase the establishment on the payment, according to the supposition before made, of half the cost.

Much of the report is taken up with matters relating to the amount subscribed, and to admissions and rejections of evidence, which we have not thought it necessary to examine,

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because the report shows that the first contracts and purchases made by the company amounted to \$285,000, and there was no intimation on the part of the plaintiffs, that more than \$175,000 was subscribed. Much of this was alleged to be colorable, optional with the subscriber, or conditional, or rescinded; but we have not thought it necessary to express any opinion upon these points, because, for the reasons stated, they were immaterial to the issue.

The rulings of the court, under which the verdict for the plaintiffs was found, being in our opinion incorrect, upon the questions whether the action could be maintained by these plaintiffs, and whether the condition of the defendant's contract had been complied with, the verdict must be set aside, and a new trial granted.

Exceptions sustained



LEVI B. MERRIAM *vs.* MOSES SEWALL & another.

WARREN WHITE *vs.* SAME.

A creditor of an insolvent debtor, who attaches his property after the commencement of proceedings in insolvency and before the assignment, has sufficient interest to maintain a bill in equity to set aside the proceedings. But if the attachment is not made until after the assignment, *quære*.

The want of an authorized signature to the petition of a creditor under the insolvent laws is ground for setting aside the proceedings.

It seems, that a commissioner of insolvency has power to allow a creditor's petition to be amended so as to set forth more precisely and fully the debt originally relied on.

The facts stated in a creditor's petition under the insolvent laws must be proved by legal and competent evidence; and *it seems*, that taking the testimony of a material witness without oath or affirmation, is ground for setting aside the proceedings.

A decree of this court in equity, affirming the validity of proceedings in insolvency, upon a petition of the debtor to set them aside, is conclusive against any subsequent application by a creditor to set aside the proceedings on the same and other grounds; even if this creditor had no notice of the first petition to this court.

BILLS IN EQUITY by creditors of Stephen G. Bass, to set aside proceedings in insolvency against him.

Merriam's bill alleged that the plaintiff commenced an action

against Bass on part of his claim, and attached his property on the 21st of March 1855; and that the defendants pretended to be assignees of his property, and had demanded the attached property, and commenced suits therefor against the attaching officer.

The bill also alleged that the proceedings in insolvency were commenced by petition to a commissioner of insolvency on the 13th of January 1855, (a copy of which was annexed to the bill,) which alleged that the Boylston Bank had a debt or demand against Bass on a draft for \$2,500, which was described in general terms; and "that they believe said Bass is insolvent, and that he has made fraudulent conveyances or transfers of his property or some part thereof; that among the conveyances so made was one of real estate in said Brookline to Jonathan Ellis, on the sixteenth day of December, now last past; also, one other conveyance of real estate, situated in said Brookline, to Warren White and Levi B. Merriam, of the same date; also other conveyances of property since said sixteenth day of December, to said White, Ellis, Merriam, Otis Norcross, Warren Fisher, or some of them, the particulars of which cannot now be given, or the exact dates when such conveyances were made; but they beg leave to insert the same when they shall be fully known. And your petitioners further represent, that they believe that, at the time of the conveyances aforesaid, the said Bass was insolvent, and that at the said time said Bass had no reasonable cause to believe himself solvent; and that said grantees or vendees had at that time reasonable cause to believe said Bass insolvent."

The bill then alleged that "thereupon a hearing was had on said petition, and the petitioner offered certain evidence, and the said Bass offered no evidence; and after all the evidence was closed, the said petitioner offered a new petition, in the form of an amendment to his original petition, which was objected to by said Bass, but which was allowed by said commissioner."

The amended petition (a copy of which also was annexed to the bill) contained a copy of the draft or bill of exchange relied

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upon, and amended the statement of the fraudulent conveyances thus: "Said petitioners allege that on the twenty-second day of December now last past a certain ship named The Aetos, at Eastport in Maine, in which said Stephen G. Bass was interested, and, with his consent, was conveyed to Levi B. Merriam, Jonathan Ellis, Warren Fisher or Warren Fisher & Co., Warren White, and Otis Norcross & Co. or Otis Norcross, to secure preëxisting debts among said several persons: that afterwards, and on or about the twenty-fifth of said December, the brig Haven Goddard was conveyed to said Levi B. Merriam and others; also a certain mortgage was made, on or about the same day, of a stock of goods in a store kept by said John W. Bass at said Eastport, together with a conveyance of book debts to Warren Fisher & Co. and Otis Norcross; also one half of the brig Stephen G. Bass to said Norcross; also the brig Brookline to said Norcross; also the brig New Era to Jonathan Ellis; also the house and furniture of said John W. Bass to said Norcross; also forty four shares of a steamboat company to Warren Fisher or Warren Fisher & Co. And your petitioners further allege, that in all or the greater part of said property said Stephen G. Bass had an interest; that the same was conveyed with his knowledge and consent, and that his interest therein was conveyed, at the time aforesaid, with his knowledge and consent; that the conveyances of said property were made to secure preëxisting debts which said Bass owed; that at the time of such conveyances said Stephen G. Bass was insolvent, and that the same were made intending to give said preëxisting creditors a preference, and at that time said Stephen G. Bass had no reasonable cause to believe himself solvent."

The petition and amended petition were both signed by "T. Gilbert for the Boylston Bank."

The bill then alleged that the proceedings in insolvency were irregular and illegal in the following particulars:

"1st. The said petition and amendment, or either of them, do not contain allegations apt to charge the said Bass with such conveyances of his property as would authorize the issuing of a

warrant against his estate under the insolvent laws of the said commonwealth.

"2d. The said amendment was improperly allowed by the said commissioner.

"3d. The several allegations in the said petition and amendment were not proved by competent and legal evidence.

"4th. All the evidence touching the amendment was allowed by the said commissioner to be put in, the said Bass objecting thereto, for a specific purpose and object; and after all the evidence was closed, the amendment allowed and the witnesses dismissed, the petitioner was permitted to use the said testimony generally to support the allegations in the said amendment and for a purpose other than that for which it had been admitted.

"5th. The testimony of one Jotham Buck, a material witness for the petitioner, was taken without the solemnity of an oath or affirmation, or of any form whatever.

"6th. There was no evidence offered tending to show that Timothy Gilbert was duly authorized to sign the said petition and amendment, or either of them, on behalf of said corporation; and your complainant alleges that he was not duly authorized."

White's bill contained substantially the same allegations as Merriam's; and also an allegation that "the claim which was the foundation of the proceedings was a draft discounted by the Boylston Bank, the petitioning creditor; and that said bank, in discounting said draft, took a greater rate of interest and exchange than was allowed by law, and that draft was therefore null and void, and did not constitute a claim against Bass, which could be made the foundation of proceedings in insolvency against him."

The defendants filed a demurrer to each bill, for want of jurisdiction, and want of equity, upon which the cases were argued together in writing, by *W. Brigham*, for the defendants, and *S. Bartlett & J. G. King*, for the plaintiffs.

SHAW, C. J. These are bills in equity, brought by the plaintiffs, as attaching creditors of the estate of Stephen G. Bass,

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against the defendants, as assignees of said Bass under proceedings in insolvency, commenced against him by an application *in invitum*, on the petition of the president and directors of the Boylston Bank. In Merriam's case there is a general demurrer to the bill, assigning for cause, 1. Want of jurisdiction. 2. No case set forth for relief in equity.

I. The court are of opinion that they have jurisdiction in equity of the matter set forth in this bill. This jurisdiction in insolvency is given by the original statute, *St.* 1838, c. 163, § 18, by which the supreme judicial court has jurisdiction as a court of chancery, in all cases under this act; and have power to hear and determine all cases not otherwise provided for, upon the bill, petition or other proper process of any party aggrieved by any proceedings under this act.

The only doubt which could arise in the present case would be, whether the plaintiff in this case is a "party aggrieved," within the true meaning and intent of the statute.

If his attachment was before the commencement of the insolvent proceedings, it would be entirely clear that he has this remedy. By the attachment he has a lien on the goods or lands attached; such a lien is a specific proprietary interest in the property, and, if not defeated, may ripen into a perfect title. But if these proceedings were regular, they would dissolve the attachment and defeat that interest by operation of law. *Smith v. Bradstreet*, 16 Pick. 264, and many other cases. The grounds of this rule are, that a party cannot be said to be aggrieved by a decree or adjudication, because he has some uncertain, possible or contingent interest, which may be affected by it; but otherwise, if he has some vested right or pecuniary interest to be divested.

But we are also of opinion, that if the attachment preceded the assignment of the property of the insolvent by the commissioner, it is sufficient to give the plaintiff an interest in the property. It is the assignment, which transfers the property of the insolvent to the assignee. The seizure on the warrant, before that is a mere sequestration, in the nature of an attachment on *resne* process for all the creditors. The general right of prop-

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erty remains in the debtor until the assignment. The attachment then, when made, creates a lien, subject only to a prior lien of the creditors, if the proceedings are regular and an assignment is subsequently made.

It does not distinctly appear on this bill, that the attachment preceded the assignment; but nothing appears to the contrary, and both parties argue it on the assumption that the attachment was before the assignment. The defendants' argument states the dates—that of the attachment March 21st 1855, and the assignment March 27th 1855.

The consideration that the assignment is declared by the *St.* of 1838, c. 163, § 5, to be conclusive of the regularity of the proceedings, in all suits brought by the assignee, gives some effect to the principle that, where the plaintiff relies upon his right as attaching creditor, and intends to support that right by impeaching the proceedings in insolvency and setting them aside, he must show that such attachment was made before the assignment.

Whether the plaintiff, upon his general right as a creditor, having no attachment to sustain, could bring this suit as an aggrieved party, we have no occasion to express an opinion in the present case; nor whether he could maintain such suit, as an attaching creditor, in virtue of an attachment made after the assignment.

We are aware that, in the case of *Hanson v. Paige*, 3 Gray, 242, the complaint was made by an attaching creditor, who attached some time after the assignment; it was held, that the court had jurisdiction, though the proceedings were not in fact in that case vacated. But the point was not made, whether the complainant was a party aggrieved; and perhaps all parties wished the opinion of the court upon the regularity of the proceedings, and for that reason forbore to object to the complainant's bill on the ground that he was not an aggrieved party. The court decided only that the complaint in equity was the appropriate remedy for the party aggrieved by the irregularity of the proceedings. We do not in the slightest degree call in question the authority of that case; the point now suggested

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was not raised or adjudged; the mind of the court was not turned to it; and whether the objection would, if taken, have prevailed to defeat the bill or not, is immaterial to the present case.

The objection to it, if any, is, that if any creditor, at any stage of the proceedings, cannot maintain a bill to set aside proceedings, after titles to property have been made and various rights acquired under it, upon exceptions which, if available at all, should be taken *in limine*, it would be attended with great inconvenience, especially as there is no provision by law, as in the analogous case of proving a will or granting administration, that an appeal is limited to a particular time. Perhaps it might be held, upon a bill or petition to annul the proceedings, that the matter, as a case in equity, would be subject to the judicial discretion of the court, under which they would hold that proceedings should not be set aside for irregularities, unless, upon a petition brought early, before the proceedings in insolvency had been much advanced. *Penniman v. Freeman*, 3 Gray, 245.

II. Do the plaintiffs show enough to entitle them to relief in equity; in other words, do they set forth sufficient reasons for vacating the proceedings?

They allege that the proceedings against Bass were founded on a petitioning creditor's debt, which was that of the Boylston Bank. The demurrer admits the truth of all matters well pleaded, that is, in the application of the rule to the present case, the demurrer admits, for the present hearing, all the facts set forth in the bill in such form that they could be put in issue and tried.

1. The original petition of the Boylston Bank is annexed and made part of the bill. It is signed by the bank by T. Gilbert. It is alleged that no evidence was offered to show that Gilbert was authorized; it is also alleged specifically, that Gilbert was not duly authorized. This is well pleaded and admitted by the demurrer. If there is no sufficient petition by the bank, it is not enough that they were creditors; they were not petitioning creditors. A petition lies at the foundation of proceedings *in invi-*

sum; as the case stands, there was no petition by the bank, and therefore all the proceedings thereon were irregular. It is not enough that no proof of Gilbert's authority was called for; that was an affirmative fact, without proof of which the commissioner had no jurisdiction.

2. We are not prepared to say that the allowance of an amendment to the petition was irregular; after the parties were duly summoned and were before the court, it seems conformable to established analogies to allow formal amendments, and incidental to the powers vested in the commissioner. See *O'Neil v. Glover*, 5 Gray, 158. We do not perceive that the amendment substitutes another claim; it states the bill of exchange, on which they originally relied, more precisely and fully. And the same remark applies to the conveyances alleged to be fraudulent.

3. It is alleged that the petition was not proved by competent evidence. This perhaps is too vague and uncertain, to be considered well pleaded, so as to be admitted by the demurrer; but in the next clause it is alleged that the testimony of one Jotham Buck, a material witness for the petitioner, was taken without oath or affirmation.

This possibly may be open to explanation, if the fact were so, and if it would be a good answer that the witness was not sworn, through inadvertence or mistake, as stated in the argument. But as it stands, it seems to be an averment that evidence was taken without oath or affirmation, intentionally and with the knowledge of the commissioner. And this is admitted by the demurrer. If this were so, it would seem to be an irregularity. The facts proved before the commissioner must be proved by legal and competent evidence.

4. It is stated, in the defendants' argument, that a previous petition or bill, in the nature of an appeal from the judgment of the commissioner, had been brought before this court by the insolvent, in which it was decided that the proceedings were valid.

This, of course, not appearing in the bill, cannot be taken notice of on demurrer. The only purpose of alluding to it

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here is to remark, that if the defendants mean to hold or rely on the analogy, that this is in the nature of a probate proceeding, and an appeal therefrom, and that one adjudication on the regularity of the proceedings ought to be final, he must set forth those proceedings with proper averments in his answer or plea, in the nature of a bar; and that is the only mode in which the decision of the court, on that matter, as *res judicata*, can be brought before the court in the present case.

The case of *White* against the same defendants is placed on the same grounds, except that one additional reason for setting aside the proceedings is thus stated: That the *Boylston Bank* discounted the draft, on which their petition was founded, at a greater rate of interest than six per cent. and so, by the provisions of law, the draft was wholly void. *Rev. Sts. c. 36, §§ 58-60.*

The question is, whether, if the facts are so, the bank could prove this debt. If they could not, if it was not a debt provable against the estate of the insolvent, then there was no good foundation for these proceedings. The answer, which the defendants make to this part of the case, seems to imply, that they consider it as founded on the general provisions of the *Rev. Sts. c. 35, § 2*, which do not make the contract affected with usury void; and treat that as a sufficient answer to the objection. But it appears that the objection is founded upon the above provisions applicable to banks alone, and prohibiting them from discounting any note at a larger rate than six per cent., under a penalty; and this would present a serious question. If the defendants intended, by their demurrer, to admit that the bill of exchange was discounted by the bank at a greater rate than six per cent., contrary to the prohibition of the statute, it would be solely a question of law. But as the demurrer must be overruled on other grounds, and, should the defendants move for leave to put in an answer, the facts on which the objection rests would be more distinctly presented, we have thought it not necessary or expedient to express an opinion on this question, in the present stage of the cause.

Demurrers overruled.

The defendants then filed answers, alleging that the regularity and legality of the proceedings in insolvency in the case of Bass had been fully settled by the judgment of this court on a petition of Bass. At a hearing before *Thomas, J.*, at November term 1857, the following facts appeared :

Bass, at February term 1855, filed a petition, in the nature of an appeal from the decree of the commissioner, declaring him insolvent, and alleged the same grounds for setting aside the proceedings in insolvency, as those now set forth in the bills of Merriam and White, except the permission of the use of testimony for purposes other than that for which it was introduced, and the illegality of the draft.

Upon that petition of Bass, notice was ordered to be given by Bass to the commissioner, and to the creditor petitioning against him before the commissioner. No other notice was ordered or given upon the petition of Bass ; and neither these plaintiffs nor any other creditors of Bass were made parties to that petition, or appeared therein. The commissioner and said petitioning creditor made answers in said proceeding ; and on a hearing, before a single judge of this court, the petition of Bass was ordered to be dismissed, and a bill of exceptions was presented to said judge, and allowed, but afterwards, and after the filing of these two bills in equity, those exceptions were waived by Bass.

At the hearing upon these two bills, it was stated by one of the counsel for the plaintiffs, who was also of counsel in the case of Bass, that at the time these exceptions were waived, the counsel in that case, upon consultation, were of opinion that, upon these exceptions, only a part of the points raised by these bills could be determined, and that it would therefore be a waste of the time of the court to proceed further in that case ; and that this was the reason which induced the counsel to advise that those exceptions should be waived, and that this was stated to the court when they were waived.

The presiding judge was of opinion that the proceedings by Bass were conclusive upon the subject matter of the bills of these plaintiffs, and ordered their bills to be dismissed, sub

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ject to the opinion of the whole court, before whom the case was argued upon this report at March term 1858.

B. R. Curtis & King, for the plaintiffs. It is a principle of universal jurisprudence, that a judgment or decree binds only parties and privies. There was no legal privity, in blood or estate, between Bass and these plaintiffs, touching this subject matter; but their proceedings were adverse to him from the beginning, and throughout.

Neither were the plaintiffs parties to the petition of Bass; for the bill did not purport to be on behalf of any one except Bass, nor against any one but the petitioning creditor and the commissioner of insolvency. Nor was any notice, either actual or constructive, ordered or given to the plaintiffs.

That the petition of Bass was in the nature of a proceeding *in rem*, and might have been so framed and conducted as to bind all the world, does not render it binding on the plaintiffs, if it was not so framed and conducted as to make them parties, with the right to appear and act as such, and with legal notice, making it incumbent on them to appear, or suffer a decree by default. *Shrewsbury v. Boylston*, 1 Pick. 105. *Crease v. Babcock*, 10 Met. 534. *Finley v. Bank of United States*, 11 Wheat. 304. *Wiswall v. Sampson*, 14 How. 67. *The Mary*, 9 Cranch, 126. *Hallett v. Hallett*, 2 Paige, 19. *Egberts v. Wood*, 3 Paige, 517. *Baldwin v. Lawrence*, 2 Sim. & Stu. 26.

The Bill of Rights, art. 12, provides that no subject shall be deprived of his property, immunities or privileges, but by the judgment of his peers or the law of the land; that is, by "due process of law;" which implies and includes regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings. *Chase v. Hathaway*, 14 Mass. 222. *Murray's Lessee v. Hoboken Land Co.* 18 How. 280, and authorities there cited.

It appears by the report that the questions sought to be raised were not fully heard and determined on the petition of Bass. The additional grounds stated in these bills are material and important to these plaintiffs, who are parties aggrieved by the proceedings of the commissioner in those particulars. Yet the

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ruling in this case precludes the plaintiffs from trying the validity of the defendants' appointment in the only way in which they can be heard thereon.

Brigham, for the defendants, cited *Livermore v. Swasey*, 7 Mass. 213; *Litchfield v. Cudworth*, 15 Pick. 23; *Loring v. Steineman*, 1 Met. 204; *Baxter v. New England Marine Ins. Co.* 6 Mass. 277; *Woodruff v. Taylor*, 20 Verm. 65; *Wright v. Watkins*, 2 Green, 547; *Williams v. Sharp*, 2 Ind. 101; *Vanderpoe. v. Van Valkenburgh*, 2 Selden, 190; *Bogardus v. Clark*, 4 Paige, 623; *Swett v. Sherman*, 2 W. Bl. 977; *Hart v. M'Namara*, 4 Price, 154 note; *Garber v. Commonwealth*, 7 Barr, 265.

THOMAS, J. No direct appeal is given by the statutes from the decree of the commissioner, by which a warrant has been issued against the estate of the debtor. The validity of the proceedings can only be tested by a petition to this court sitting in equity, under the provision of the *St.* of 1838, c. 163, § 18. Such petition is in the nature of an appeal, with its legal incidents.

If the statute had given to the debtor or his creditors the right of direct appeal from the decree of the commissioner, it is quite plain that the affirmation or reversal of the decree in this court must bind and conclude all parties in interest. There could be but one appeal, and one judgment upon that appeal; and that judgment must be conclusive as to the subject matter of the decree from which the appeal was taken. It is in the nature of a judgment *in rem*, the thing being the estate of the debtor and its sequestration for the benefit of his creditors.

To allow separate appeals by the debtor and the several creditors would be to keep the estate forever open and in controversy. The question might be differently decided upon the evidence of different states of facts.

The same evils indeed would follow as from permitting the question of the validity of the proceeding to be tried collaterally in suits at common law, brought by the assignee. *St.* 1838, c. 163, § 5.

In suits prosecuted by the assignee, the assignment is made conclusive evidence of his authority to sue, precisely because

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it was intended that the question of the validity of the assignment should be tried and conclusively settled in a proceeding instituted for the purpose. *Partridge v. Hannum*, 2 Met. 569 *Wheelock v. Hastings*, 4 Met. 504. *Hanson v. Paige*, 3 Gray, 239. *Whithead v. Mallory*, 4 Gray, 180.

The reasons apply with equal force to a petition in the nature of an appeal, for the purpose of testing the validity of the proceedings by which a warrant has issued against the estate of the insolvent. Whatever may be the grounds of objection, and by whomsoever presented, the question is but one — Is the decree valid? If so, the legal consequences follow to the debtor and creditors, for the decree cannot be void as to the one, and valid as to the other.

As matter of practice, it would have been well that, after filing the petition by Bass, public notice should have been given to all persons interested. But this was not necessary. Notice had been given of the issuing of the warrant and of the first meeting of the creditors. Any creditors who, by reason of attachments upon the estate or otherwise, had an interest adverse to the proceedings, were fairly put upon their inquiry. If they objected to the proceedings, the objection should have been taken at an early stage of the case. If they found the debtor had brought a bill to vacate the proceedings, they could have made themselves parties to the bill, and have insisted upon all possible objections. But they cannot try again the question settled once, and finally, under the petition of the debtor.

Petition dismissed.

HENRY JONES vs. CHARLES ROBBINS.

A statute conferring on police courts concurrent jurisdiction with the court of common pleas and the municipal court of Boston "of all larcenies where money or other property stolen shall not be alleged to exceed the value of fifty dollars, in all which cases the punishment imposed may be such as the court of common pleas and the municipal court are authorized to inflict by existing laws," includes aggravated as well as simple larcenies.

A statute, which authorizes a single magistrate to try and pass sentence in a criminal case, but gives the defendant an unqualified and unfettered right of appeal, and a trial by jury in the appellate court, subject only to the requirement of giving bail for his appearance there, or, in default of such bail, being committed to jail, is not unconstitutional as impairing the right of trial by jury. THOMAS, J. dissenting.

A statute, which gives a single magistrate authority to try an offence punishable by imprisonment in the state prison, without presentment by a grand jury, violates the twelfth article of the Declaration of Rights. MERRICK, J. dissenting.

PETITION for a writ of *habeas corpus*. The facts of the case, which was argued in the last vacation, by *F. W. Hurd*, for the petitioner, and *G. W. Cooley*, (County Attorney,) for the respondent, appear in the opinion of the majority of the court, as delivered by

SHAW, C. J. The petitioner sets forth that he is a prisoner in the house of correction in the city of Boston, upon a mittimus or warrant, issued by the police court of the city, under a conviction in that court, and a sentence thereon to an imprisonment at hard labor in the house of correction for the term of six months.

It appears by the complaint and conviction thereon, upon a plea of guilty, that he was charged and convicted of stealing in a building, to wit, in the shop of one Horace Mecum, one gold ring, of the value of fourteen dollars, of the goods and chattels of said Mecum.

1. It is contended, on the part of the petitioner, that this conviction and commitment are inoperative and void, for the reason that the police court, though it had jurisdiction to receive this complaint, and, upon the arrest of the party, to examine and bind him over for trial, still had no jurisdiction to try and pass sentence upon him; because the complaint and judgment manifestly

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describe an aggravated, and not a simple larceny, an offence which, by the terms of the law prescribing a punishment therefor, is punishable by imprisonment in the state prison, not more than five years, or by fine and imprisonment in the jail or house of correction. Rev. Sts. c. 126, § 14; c. 143, § 19. This we suppose to be the true distinction; that if a warrant of commitment be issued by a court of general jurisdiction, although it be erroneous and not conformable to law, it will still stand good, unless examined and reversed by writ of error or otherwise; but if a court of special and limited jurisdiction exceed the authority conferred, and issue a warrant of commitment, the judgment is void, and not merely voidable, and the commitment under it is illegal, and may be inquired into on *habeas corpus*, and if the commitment is wrong, the party may be discharged.

This we have regarded as a very grave and important question, the more so because we understand that a difference of opinion and adjudication has arisen, upon this subject, between the municipal court of this city and the police court; and such a difference must obviously be highly unfavorable to the administration of justice in the courts of criminal jurisdiction.* Considering this as a proper and convenient mode of bringing this question to the consideration of this court, we have endeavored, after argument, to give it the same deliberate consideration, as if it had been brought before us by writ of error.

In support of the jurisdiction of the police court, it is urged, that this jurisdiction is expressly conferred by St. 1855, c. 448. And it becomes necessary therefore to examine that statute.

The first section provides that "the several police courts of this commonwealth shall have concurrent jurisdiction with the municipal court of Boston and the court of common pleas [that is, the police court of Boston with the municipal court of Boston, and the police courts in other counties with the court of common pleas for such counties] of all larcenies where money

* See *Commonwealth v. Brown*, 21 Law Reporter, 23; *Commonwealth v. McEgan*, 21 Law Reporter, 33.

or other property stolen shall not be alleged to exceed the value of fifty dollars; in all which cases the punishment imposed may be such as the court of common pleas and the municipal court are authorized to inflict by existing laws."

Construed by itself, this would appear to authorize the police court to hear and determine all cases of larceny, where the property stolen does not exceed \$50, and by these terms would include aggravated as well as simple larcenies, limited only by the amount of the property stolen. But it is argued on the other hand that, construed in reference to all the previous statutes on the same subject, according to the well known rule of exposition that all statutes *in pari materia* are to be taken into consideration, the legislature must necessarily have intended to limit this jurisdiction to cases of simple larceny only. The argument is, that if it can be shown that the purpose of the legislature was to confine this jurisdiction to simple larcenies alone, then it would follow that the terms "all larcenies" would be controlled and modified, and keep the jurisdiction of police courts within the original prescribed limits, that of justices of the peace in cases of petit larceny and other trivial offences. But it is a question whether, if it could be construed to be limited to simple larceny, this consequence would follow; because it is expressly provided by this St. of 1855, that such police court shall have the power to impose the same punishment as the court of common pleas and municipal court. But by the Rev. Sts. c. 126, § 17, such simple larceny, of property under \$100, upon a conviction in an upper court, may be punished by imprisonment one year in the state prison. The same power therefore would, by the terms of this act, be given to the police court by this statute, whether in cases of simple or aggravated larceny.

It becomes necessary, therefore, it seems to us, in order to put a just construction on this statute, to look back as far at least as the Rev. Sts., and consider these and the subsequent legislative acts in reference to the principles and provisions of the Constitution of the Commonwealth.

In considering what are the provisions of the Rev. Sts. for the punishment of larcenies, we must distinguish between cases

where the real offence intended to be punished is stealing, and the cases where another offence is the principal thing against which the penalty is levelled, although stealing is stated as an ingredient; such as cases of breaking and entering a dwelling-house, shop, vessel or meeting-house, by night or by day, and stealing therefrom. These are either burglary, or acts in the nature of burglary, where the theft is not the leading or principal object of punishment. These are enumerated in the Rev. Sts. c. 126, §§ 9-14, and are all of this character, except perhaps the first clause of § 14, "stealing in a dwelling-house, shop," &c.

Then come §§ 15 and 16, and enumerate several aggravated larcenies, that is, cases where the gravamen of the offence is stealing, but aggravated by the circumstance that it was in a building on fire, or of property exposed by removal on an alarm of fire, or from the person of another. In these cases, the value of the property thus stolen is not stated as an ingredient or qualification of the offence; but it derives its aggravated character from the place, time or circumstances under which a larceny to any amount, however small, may be brought within its provisions. The terms "aggravated" larceny, and "simple" larceny, under our statutes, are not to be confounded with the terms "grand" and "petit" larceny at common law, where the distinction consisted solely in the value of the property stolen. Section 17 enumerates a long list of articles, apparently intending to include every species of property susceptible of being the subject of larceny, and provides that the stealing of any or either of them, mentioning no time or place as matter of aggravation, shall be punished, if the value be over \$100, by imprisonment in the state prison not exceeding five years, or by fine and imprisonment, and, if under \$100, by state prison not exceeding one year, or by fine and imprisonment. These are all simple larcenies, not because so denominated in the statute, but because no qualification is annexed to render them aggravated and the value of the property is made an essential element in fixing the punishment.

Here then we have, in addition to burglarious offences, of which stealing may be a part, two distinct classes or species of

larceny, which may be, conveniently enough, denominated "aggravated" and "simple," because they are differently described and punished; the former, manifestly being more severely punished, and without regard to value, must be deemed aggravated; and the latter, attended by none of the aggravating circumstances, and varied in punishment only by the larger or smaller alleged value of the property stolen, are simple.

Then comes the 18th section conferring jurisdiction; and it provides, that justices of the peace and police courts shall have concurrent jurisdiction with the court of common pleas and municipal court of all the larcenies mentioned in the preceding section namely, simple larcenies, when the property stolen is not alleged to exceed \$15, and of all other larcenies whatever, when the property stolen is not alleged to exceed \$5.

What was the legal effect of this distinction? If, as is suggested in the argument against the jurisdiction of the police court, this was not intended to include aggravated larcenies under \$5, but other larcenies of like kind, which might have been omitted in the specific enumeration—that is, all simple larcenies—then there could have been no reason for limiting such "other larcenies" to stealing property of smaller value, only \$5; but it would have included all others of like kind, without distinguishing the value. Besides, the justices' jurisdiction, extending to \$15 in value, is limited to the larcenies mentioned in the sixteenth section, that is, simple; then a further jurisdiction, in all other larcenies of property not exceeding \$5, seems necessarily to extend the jurisdiction to the other larcenies described in the preceding sections, which were the aggravated. The more natural supposition is, that the legislature well knew that, although a theft may, in many cases, be aggravated by stealing from a shop an article of small value, it may still, in point of fact, in many other cases, come under the category of a petty offence, punishable by fine or imprisonment, or at most for a brief period in the house of correction. Stealing a silver spoon from a shop may, under some circumstances, be no more heinous an offence than stealing the same article in a field to which it has been taken for use and left exposed.

It seems to us therefore, that the most natural construction of these clauses, taken together, is this; that jurisdiction was intended, according to a long course of practice, to be given to a justice of the peace or police court, in cases of petty offences and small pilfering, though amounting in law to larceny, and, of course, felony at common law — in case of simple larceny to the amount of \$15, and in an aggravated larceny not exceeding \$5; and that these should be deemed petty, and be punishable by a justice of the peace; but the limitation of his power, in cases where he should finally try and decide and pass sentence, was to be found in the express limitation of the maximum of punishment to fine and imprisonment, excluding the state prison.

It seems manifest therefore, that the legislature did define certain offences by one general designation, and to a certain extent gave a concurrent jurisdiction to different tribunals, and did provide, that an offence coming under that designation, if conviction was had, and in one of those tribunals, might be punishable by imprisonment one year in the state prison; but if conviction was had before a justice of the peace, it would not be subjected to a state prison punishment.

This would, at first view, seem to be an anomaly in the law; but probably it was founded on the obvious consideration, that a law, to prohibit and punish offences, must, in its nature, be prospective; and must be general in its terms, broad enough to embrace the most heinous offences, and also the most trivial, which can be embraced in such general definition, the punishment varying from one very severe to one very slight, according to the actual nature of the offence. But when it appears, from the complaint actually made, and the facts adduced in support of it, that it is in fact a trivial and unimportant offence in its actual guilt, it shall be punished accordingly; and the legislature probably thought it not unsafe, when on such complaint being made and evidence offered, it should appear to fall within the class of petty offences, to permit the justice of the peace or police court to proceed to try the party complained of, saving to him an unqualified right of appeal to a court sitting with a

jury, such a right of appeal being attended with no other burden but that of giving bail or standing committed, not by way of punishment, but simply to secure the person of the accused to be ready to take his trial and abide the judgment. This inconvenience every party, from the necessity of the case, must be subject to, during the time which elapses between his arrest and trial; and is an inconvenience to which the party thus convicted would be subject, if, instead of a conviction and appeal, the justice of the peace or police court had ordered him, after examination, to give bail for his appearance at the higher court for a first trial, or stand committed, which would be the only alternative.

That this was not hasty or inadvertent legislation, is manifest from the fact, that the same provisions are made as to the relative jurisdiction and powers of courts of common pleas and justices of the peace in § 23 of the same chapter, in relation to receivers of stolen goods.

The question then recurs, whether there is any statute, since the Rev. Sts., which enlarges the jurisdiction of justices of the peace or police courts, so as, in terms, to authorize them to sentence a convict, in any case, to the state prison. Several statutes have been cited; we will refer to them.

The *St.* of 1843, c. 1, § 1, provides for larceny in a dwelling-house in the night time. No jurisdiction is given to justices of the peace.

The *St.* of 1845, c. 28, provides for stealing in the night time from any shop, office, bank, &c.

The *St.* of 1851, c. 151, extends the provisions of the law of larceny to trespass on the realty, and carrying away property when severed; and by § 3 "such courts and justices are to have jurisdiction of such simple or aggravated larcenies," as if the property were personal.

In the *St.* of 1851, c. 156, the three first sections relate to cases of breaking and entering. By § 4, larceny "by stealing in any building" is punishable by state prison, or fine and imprisonment in the jail or house of correction. We do not perceive that this provision varies the law; except in an increase of the

punishment, it does not appear to alter the jurisdiction as given by the Rev. Sts.

The St. of 1852, c. 4, is an enlargement and amendment of the St. of 1851, c. 156. The original act, of course, by its general effect, without special provisions, gave jurisdiction to the court of common pleas and municipal court. But this statute, as to the St. of 1851, c. 156, § 4, which provides a punishment for aggravated larceny, not varying the maximum or minimum of punishment, gives jurisdiction to justices of the peace and police courts, to hear, try and punish, by fine not exceeding \$20, or by imprisonment in the common jail or house of correction, not exceeding one year, where the property stolen does not exceed \$10.

Such, we believe, was the state of the law upon this subject, when the St. of 1855 was passed. By every previous act, if the law did in terms give to a police court or justice of the peace jurisdiction, at their discretion, to hear, decide and pass sentence, it was always accompanied with the two restrictions, that the accused had an unqualified right of appeal to a court sitting with a jury, and a trial by jury therein; and the power of inflicting punishment was limited, as its maximum, to fine and imprisonment in jail or house of correction, and did not extend to imprisonment in the state prison.

The St. of 1855, c. 448, extends the jurisdiction of police courts, (not of justices of the peace,) by which they shall have concurrent jurisdiction with the court of common pleas or municipal court, when the property alleged to be stolen does not exceed \$50, in which cases the punishment imposed may be such as the court of common pleas and municipal court are authorized to inflict by existing laws. By this reference to existing laws, and finding that those courts, in cases of simple larceny under \$100, including of course all cases under \$5, have power to punish by confinement to hard labor in the state prison, it follows that this statute purports to confer a like power on police courts. Now, as a police court sits without a jury, and, according to the general policy of the law, exercises the powers of a justice of the peace within certain local limits, no distinc-

tion is perceived between conferring this jurisdiction on police courts and on justices of the peace by the legislature.

We are then brought, in the construction of this statute, to two questions: 1st. Whether this jurisdiction is limited to simple larcenies only, and does not extend in any case to aggravated larcenies; and 2d. If it does extend to aggravated larcenies, and authorizes a police court to sentence to the state prison, for one or five years, whether the statute is not unconstitutional, inoperative and void.

For the reasons already given, we are of opinion that this statute, by its terms, and construed with reference to all other statutes on the subject, cannot be limited in its terms to simple larcenies; but that by "all larcenies" was intended that class of larcenies known as aggravated, (not of course where a breaking and entering a dwelling-house or shop, by night or day, enters into and constitutes the gravamen of the offence,) and that it cannot be limited to simple larcenies. But even if we could construe the *St.* of 1855 as intended by the legislature to limit the jurisdiction to simple larceny only, the section authorizing a police court to impose the same punishment which a court of common pleas or municipal court may inflict would authorize the police court to sentence one, convicted of simply larceny, to the state prison for one year.

2. But the next question is, if it does bear the construction that it extends to aggravated larceny, whether it was competent for the legislature to make such a law, or, in other words, whether it is not repugnant to the Constitution of this commonwealth, and so inoperative and void, so that, if the conviction on which the petitioner is committed stands upon the authority of this statute alone, it is not illegal? And upon this last point, we think it must depend upon this statute only.

By the revised statutes, as we construe them, justices of the peace and police courts had jurisdiction to try and pass sentence in cases of simple larceny, where the property alleged to be stolen does not exceed \$15, and in aggravated larcenies, not coupled with any burglarious act, where the property does not exceed \$5. The *St.* of 1851, c. 156, § 4, provided for punishing

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an aggravated larceny, by stealing in a building, under the usual penalty of state prison five years, or by fine, or by imprisonment in the house of correction or county jail. Then, by *St.* 1852, c. 4, this last statute was altered and amended by giving police courts and justices of the peace jurisdiction to try, and decide and pass sentence, by fine not exceeding \$20, or imprisonment in the jail or house of correction not exceeding one year, where the property stolen does not exceed \$10.

It appears therefore, that no statute, previous to that of 1855, has extended this jurisdiction, in case of aggravated larceny, to any case where the property alleged to have been stolen exceeds \$10. But in the case before us, the complaint against Jones alleged that the property stolen from a building was of the value of \$14, and therefore we think it was not within the jurisdiction of the police court, unless by the *St.* of 1855. We are therefore necessarily brought to the inquiry, Whether that act is unconstitutional? Such a question must always be regarded as one of great delicacy, and will be entertained by a judicial tribunal in those cases only, where it is essential to the public welfare or the just rights of parties.

It first occurred to us to see whether we might not consider the two parts of the *St.* of 1855, to wit, that which confers jurisdiction on police courts, concurrently with the court of common pleas and municipal court, where the property does not exceed in value \$50; and that part which gives to police courts the same power with the court of common pleas to inflict punishment, including imprisonment in the state prison; as distinct.

It is undoubtedly a correct rule of construing a statute in reference to its constitutionality, to consider only such part void as is plainly repugnant to the Constitution; and therefore, where there are different provisions in the same statute, so distinct and independent, that the one may not have been the motive or inducement to the other, one may be held valid and the other void. *Ex parte Wellington*, 16 Pick. 95-97. *Fisher v. McGirr*, 1 Gray, 21. But in bringing the case in question to this test, we think it cannot fall within this distinction. Both in the *Rev. Sts.* and the *St.* of 1852, the value of the property

stolen seems to have been regarded as an important ingredient in determining whether or not a police court should have jurisdiction to try and pass sentence, where the nature of such punishment was expressly so limited as to exclude imprisonment in the state prison. An aggravated larceny, where the property stolen is \$50, can hardly come under the denomination of pilfering, or a petty offence; on the contrary, it is an offence of considerable magnitude, in view of which we are not prepared to say, that the legislature would have extended the jurisdiction to a police court, if they had not accompanied it with a power in that court to inflict the same punishment as the court of common pleas or municipal court was authorized to inflict. We think therefore that the two parts of this enactment were not separate and independent of each other, but the one may have been the motive, inducement or consideration on which the other was founded, and that they must stand or fall together. *Warren v. Mayor & Aldermen of Charlestown*, 2 Gray, 99.

The provisions of the Constitution, vesting power in the legislature to make all useful and wholesome laws, and to erect and create judicatories and courts of record or other courts for the hearing and determining all crimes and offences, if there were no restraint upon such power in the Constitution, would be broad enough to warrant the enactment in question. But it is true that, by the Bill of Rights, various restrictions are placed upon this general power, intended for the better security of persons accused of crime against arbitrary and hasty public prosecutions; and the question is, whether the Bill of Rights, by its provisions, or by necessary implication, does not restrict the legislature from making laws subjecting any party to an infamous punishment, by a prosecution not commencing with an indictment or presentment of a grand jury? If not so restrained, then it is manifest that, under the law which we have before us, the magistrate might sentence a party accused to imprisonment in the state prison for five years; and it would also follow, that the legislature might make a law, giving to the justices of peace and police courts, sitting without a traverse jury, the

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power to hear, determine and pass sentence, to any extent of punishment warranted by law, provided only that such authority be accompanied by a provision, that the party convicted shall have a clear and unqualified right of appeal to a court sitting with a traverse jury, with a right of trial by such jury, still without the previous intervention of a grand jury; and thus, by statute, grand juries may be dispensed with altogether, in cases not capital. These consequences of the construction of the Constitution in favor of the validity of this law are so momentous, that we are called upon to give it the most serious and deliberate consideration, before deciding this question in the affirmative.

In considering constitutional provisions, especially those embraced in the Declaration of Rights, and the amendments of the Constitution of the United States, in the nature of a bill of rights, we are rather to regard them as the annunciation of great and fundamental principles, to be always held in regard, both morally and legally, by those who make and those who administer the law, under the form of government to which they are appended, than as precise and positive directions and rules of action; and, therefore, in construing them, we are to look at the spirit and purpose of them, as well as the letter. Many of them are so obviously dictated by natural justice and common sense, and would be so plainly obligatory upon the consciences of legislators and judges, without any express declaration, that some of the framers of state constitutions, and even the convention which formed the Constitution of the United States, did not originally prefix a declaration of rights.

Art. 12 in our own bill of rights is as follows: "No subject shall be held to answer for any crime or offence, until the same is fully and plainly, substantially and formally, described to him; or be compelled to accuse, or furnish evidence against himself; and every subject shall have a right to produce all proofs that may be favorable to him; to meet the witnesses against him face to face, and be fully heard in his defence, by himself or his counsel, at his election. And no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or

privileges, put out of the protection of the law, exiled, or deprived of his life, liberty or estate, but by the judgment of his peers or the law of the land. And the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy without trial by jury."

The last clause, which seems to have been added for greater caution, prohibiting the legislature from making any law which shall subject any person to a "capital" or "infamous punishment," excepting for the government of the army and navy, without trial by jury, is somewhat more explicit than the preceding clause, "judgment of his peers," and may be equivalent to the clause in the sixth article of amendment of the Constitution of the United States, declaring that, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." We believe it has been so practically understood; and where, by the terms of any law, a justice of the peace or police court has been authorized to hear and pass sentence, it has always been accompanied by a right of appeal. And we believe it has been generally understood and practised here and in Maine, and perhaps in other states having a similar provision, that as the object of the clause is to secure a benefit to the accused, which he may avail himself of or waive, at his own election; and as the purpose of the provision is to secure the right, without directing the mode in which it shall be enjoyed; it is not violated by an act of legislation, which authorizes a single magistrate to try and pass sentence, provided the act contains a provision that the party shall have an unqualified and unfettered right of appeal, and a trial by jury in the appellate court, subject only to the common liability to give bail, or to be committed to jail, to ensure his appearance and to abide the judgment of the court appealed to. This is a necessary inconvenience, as is also the delay of the trial till the sitting of such court; they are the same and no greater than they would be in case the magistrate, instead of passing sentence, should, on examination, bind the accused over, or, as the necessary alternative, commit him to jail. Such seems to have

been the construction of a similar provision in other states. *Emerick v. Harris*, 1 Binn. 416. *Murphy v. People*, 2 Cow. 815. *Jackson v. Wood*, 2 Conn. 819. *Beers v. Beers*, 4 Conn. 535. *Sullivan v. Adams*, 3 Gray, 477. It appears to us, therefore, that such a provision is not void, as a violation of that clause, which, in criminal cases, secures to the accused a right of trial by jury.

Still this leaves the other question, whether a party can be made subject to a punishment for a term of years in the state prison, without indictment or presentment of a grand jury.

We are then to consider the prohibition to be found in the other part of the 12th article. In the commencement of the article, "no subject shall be held to answer for any crime or offence until the same is fully and plainly, substantially and formally, described to him," the makers very accurately describe a good indictment; and it is very probable that this was the predominant idea in their minds, though an information, complaint or other form of charge might conform to the same requisitions, and therefore this provision is not conclusive. But the subsequent clause goes further: "no man shall be arrested, imprisoned, exiled, or deprived of his life, liberty or estate, but by the judgment of his peers, or the law of the land."

This clause, in its whole structure, is so manifestly conformable to the words of *Magna Charta*, that we are not to consider it as a newly invented phrase, first used by the makers of our constitution; but we are to look at it as the adoption of one of the great securities of private right, handed down to us as among the liberties and privileges which our ancestors enjoyed at the time of their emigration, and claimed to hold and retain as their birthright.

These terms, in this connection, cannot, we think, be used in their most bald and literal sense to mean the law of the land at the time of the trial; because the laws may be shaped and altered by the legislature, from time to time; and such a provision, intended to prohibit the making of any law impairing the ancient rights and liberties of the subject, would under such a construction be wholly nugatory and void. The legislature

might simply change the law by statute, and thus remove the landmark and the barrier intended to be set up by this provision in the Bill of Rights. It must therefore have intended the ancient established law and course of legal proceedings, by an adherence to which our ancestors in England, before the settlement of this country, and the emigrants themselves and their descendants, had found safety for their personal rights. Lord Coke, in commenting upon this clause of *Magna Charta*—*nisi per legem terræ*—adopts the construction that the clause meant “without process of law, that is, by indictment or presentment of good and lawful men.” 2 Inst. 50. This may not be conclusive; but, being a construction adopted by a writer of high authority, before the emigration of our ancestors, it has a tendency to show how it was then understood.

Chancellor Kent, after setting forth the rights and liberties claimed by the people of this country, and in explanation of these words from *Magna Charta*, says: “The words *by the law of the land*, as used originally in *Magna Charta* in reference to this subject, are understood to mean due process of law, that is, by indictment or presentment of good and lawful men,” and he relies on the authority of Lord Coke for the correctness of this exposition. 2 Kent Com. (6th ed.) 13.

The same view of this clause in our constitution is taken by Judge Story in his Commentaries on the Constitution. § 1783.

It is well understood that, prior to and during the American Revolution, and especially from and after the Declaration of Independence, when new constitutions for the states were to be formed, it was desirable that the form of government, and the powers vested in its different departments, should be expressed and limited, in written constitutions, being fundamental laws, emanating from the people, and unalterable, but by the same original authority; and for the better security of the rights of life, liberty and property, it was deemed essential that the fundamental principles of free government should be set down in a few plain, clear and intelligible propositions, for the better guidance and control, both of legislators and magistrates. This would be useful as a guide and monitor of public opinion, as a

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check upon all who professed to be governed by a sense of duty strengthened by an oath to perform it, and would be more especially necessary where such written constitution itself was to be regarded as law for the government of the judicial department, and necessarily required to bring every legislative enactment to the test of the Constitution. Most of the state constitutions did contain these declarations, more or less detailed and explicit; but the general purpose was to assert and maintain the great rights of English subjects, as they had been maintained by the ancient laws, and the actual enjoyment of civil rights under them. "The sense of America was," says Chancellor Kent, "more fully ascertained, and more explicitly and solemnly promulgated, in the memorable Declaration of Rights of the first continental congress, in October 1774, and which was a representation of all the states except Georgia. That declaration contained the assertion of several great and fundamental principles of American liberty; and it constituted the basis of those subsequent bills of rights which, under various modifications, pervaded all our constitutional charters." 2 Kent Com. 5, 6.

The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offences, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty.

In summing up these privileges, as intended to be secured by the American constitutions, Chancellor Kent states them thus: "The right of personal security is guarded by provisions transcribed into the constitutions in this country from *Magna Charta* and other fundamental acts of the English parliament, and enforced by additional and more precise injunctions. The substance of them is, that no person, except on impeachment, and in cases arising in the naval and military service, shall be held to answer for a capital or otherwise infamous crime, or for any offence above the common law degree of petit larceny, unless

he shall have been previously charged on the presentment or indictment of a grand jury." 2 Kent Com. 12.

The same view of the effect of the use of the term "law of the land," as used in the American constitutions, has been adopted in the State of Maine, where it is held to be prosecution according to the due course of law, including trial by jury, and prosecution by indictment, for all the higher crimes and offences. *Saco v. Wentworth*, 37 Maine, 172. So in New York. By Bronson, J., in *Taylor v. Porter*, 4 Hill, 145.

We are then brought to the consideration of the corresponding provision in the Constitution of the United States, made and adopted seven or eight years after that of Massachusetts; and compare the two provisions together. It is well known how this provision, by way of amendment, originated. The original constitution, as reported by the federal convention at Philadelphia, contained no Bill of Rights, and it was strenuously objected to on that account. In order to ensure the adoption of the constitution in Massachusetts, it was proposed to combine with the vote of ratification certain specified amendments, one of which was the clause afterwards adopted by way of amendment, as hereafter mentioned. This was proposed by John Hancock, the president of the convention, and this specific provision advocated by Governor Bowdoin and other members. The amendment, as adopted, art. 5, was as follows: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger."

Could this provision be held to bind the several states in their legislation and jurisprudence, it would put the matter beyond doubt, except, perhaps, the difficulty of drawing the precise line between "infamous" and minor or petty offences. But we take it to be now well settled, by strong reasons as well as decisive authority, that this fifth amendment was designed solely to put a limit upon the authority of congress, in framing laws for the government of the United States, and did not extend to the

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laws of the several states. *Barron v. Mayor &c. of Baltimore* 7 Pet. 243. *Commonwealth v. Hitchings*, 5 Gray, 485.

But as a commentary upon the less precise and explicit terms of our own declaration of rights, in providing that no subject shall be deprived of life, liberty or property, but by the judgment of his peers or the law of the land, it seems to us to have a legitimate bearing upon the question we are examining. It is the more significant when we consider that it originated in Massachusetts, a few years later, and was adopted by nearly the same set of public men, but after some other constitutions had been under discussion, and when the ideas of American statesmen on these subjects had become more exact and definite.

It having been stated by Lord Coke that, by the "law of the land" was intended a due course of proceeding, according to the established rules and practice of the courts of common law, it may perhaps be suggested, that this might include other modes of proceeding, sanctioned by the common law, the most familiar of which are, by informations of various kinds, by the officers of the crown in the name of the king. But in reply to this it may be said, that Lord Coke himself explains his own meaning by saying, "the law of the land," as expressed in *Magna Charta*, was intended due process of law, that is, by indictment or presentment of good and lawful men. And further, it is stated, on the authority of Blackstone, that informations of every kind are confined by the constitutional law to misdemeanors only. 4 Bl. Com. 310. And though it is true, that many misdemeanors are regarded as acts of criminality, highly injurious to the State, and punished with severity, yet they are of a grade inferior to treason and felony. And, in this country, though informations were probably more rare, yet we suppose they were in use mostly for the purpose of preventing negligence and enforcing the performance of public duties on the part of public officers, corporations and the like; yet Mr. Dane says, they are confined, by our constitutional laws, to mere misdemeanors, and adds that, by the constitutions of several individual states, and by an amendment of the Constitution of the United States, they cannot be used where either capital or infamous punishment is inflicted. 7 Dane Ab. 280.

Thus it appears that Mr. Dane, eminent both as a statesman and jurist, and who was a contemporary with the authors of the constitutions, puts the same construction upon the Massachusetts Bill of Rights, and the amendment of the Constitution of the United States. The article in the Massachusetts Bill of Rights, in the clause following the "law of the land," adds, "and the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury." These terms, "capital or infamous punishment," used in contra distinction to all smaller and minor correctional punishments being embraced in the same article, and applicable to the two rights so similar, that of indictment by a grand jury, and a trial of that indictment by a traverse jury, are rightly held to apply to both of these subjects.

It seems therefore quite manifest, that the makers of the Constitution of the Commonwealth intended to make a marked distinction between crimes of great magnitude and atrocity, and to secure every person against accusation and trial for them without the previous interposition of a grand jury in the first instance; and to leave minor and petty offences to be prosecuted without these formalities, subject only to this restriction, that in all cases the party accused should have a right to a trial by jury, if he should desire it.

Then comes the practical difficulty, as before suggested, in ascertaining, in particular cases, what are infamous punishments, or, in other words, what are infamous crimes and offences. The technical distinction between felony and misdemeanor will not meet it; because all larceny is felony; and yet petty larceny or pilfering, associated as it is with vagrancy and other small and not well defined offences, has always been punishable by a magistrate or justice of the peace, both under the colonial and provincial governments, from the earliest settlement of the country. Indeed, offences not above the degree of petit larceny are put, by Chancellor Kent, by way of example, as offences not infamous, and therefore not within the constitutional restriction. Nor is it easy to perceive precisely what was

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intended in the article, by the term "infamous punishment." In general terms, all punishments which touch a man's person may, in a certain sense, be deemed disgraceful. The punishments in use under the colonial and provincial governments, were imprisonment in the common jail, hard labor in the work house or house of correction, pillory, sitting on the gallows, cropping one or both ears, branding on one or both cheeks, with indelible ink, the letter T for thief, or B for burglar, whipping, setting in the stocks; in case of larceny, restoration of threefold the value of the property stolen to the party injured, with a liability to be sold to service to pay it. Most of these must be deemed infamous, though, in fact, we are inclined to the belief that imprisonment in the common jail or work house was not formerly so regarded. And considering the ideas and usages which prevailed under the former governments of our state, it may well be doubted whether the penalty of sitting in the stocks, and whipping, limited to a small number of stripes, and confided to a magistrate or justice of the peace, were not regarded, at the time of the adoption of the Constitution, rather as correctional than as infamous punishments.

But whatever may have been the practical difficulty in distinguishing between infamous punishments and others, before the *St.* of 1812, c. 134, we think it was greatly relieved, if not removed, by that act, which made a radical change in the policy of the Commonwealth in regard to punishments for the higher and more atrocious crimes and offences. It provided that, on conviction before the supreme judicial court, (who, at that time, had exclusive jurisdiction of all such aggravated offences,) for any crime or misdemeanor then punishable by whipping, standing in the pillory, sitting on the gallows, or imprisonment in the common jail, the court might, in lieu of such punishments, sentence such convicts to suffer solitary imprisonment, and to be confined to hard labor for a time not exceeding five years, without any limit as to the minimum. This, it will be recollected, took place soon after the state prison at Charlestown had been organized and got into full operation. This practically took away all the degrading and ignominious punishments formerly

provided by law ; and if it did not in terms extend to all of them, because not included in the enumeration, the acts authorizing them were afterwards repealed, in terms, in 1836, by the repealing act accompanying the revised statutes.

Now, it seems to us that, whether we consider the words "infamous punishment" in their popular meaning, or as they are understood by the Constitution and laws, a sentence to the state prison, for any term of time, must be considered as falling within them. The convict is placed in a public place of punishment, common to the whole state, subject to solitary imprisonment, to have his hair cropped, to be clothed in conspicuous prison dress, subjected to hard labor without pay, to hard fare, coarse and meagre food, and to severe discipline. Some of these a convict in the house of correction is subject to ; but the house of correction, under that and the various names of work-house and bridewell, has not the same character of infamy attached to it. Besides, the state prison, for any term of time, is now by law substituted for all the ignominious punishments formerly in use ; and, unless this is infamous, then there is now no infamous punishment, other than capital. Now, when we consider that, since the adoption of the constitution, no act has been passed, before the one now under consideration, giving jurisdiction to a justice of the peace or police court, to try, decide and pass sentence, and no such jurisdiction has been exercised or claimed, unless where either, first, the statute creating and punishing the offence has limited the punishment to a penalty less than the state prison ; or second, where, if the punishment of the offence was not thus limited, the power of a justice of the peace or police court, in cases where they were authorized to try and pass sentence, has not thus limited the punishment by the statute giving the jurisdiction ; it leads to a strong conclusion of the general understanding of the legislators and jurists of Massachusetts, that punishment in the state prison is an infamous punishment, and cannot be imposed without both indictment and trial by jury.

We have already suggested, but it may be proper to repeat in conclusion, that although this jurisdiction does authorize a

justice of the peace or police court to pass sentence, it does not necessarily defeat or impair the right of trial by jury, by appeal; yet, as such trial on the appeal must necessarily be a trial on the original complaint, without indictment, it does take away that shield of protection from a party accused of crime, intended for his protection and security, when the punishment is infamous. As the statute in question does purport to confer on a police court the power to punish a convict, by the "infamous punishment" of imprisonment in the state prison, and the convict might be so punished by the police court, and, on appeal, by the appellate court, without an indictment by the grand jury, the court are of opinion that the act is unconstitutional, and, of course, inoperative and void; not because it confers jurisdiction on a police court, to take cognizance of an aggravated larceny, on complaint, and try and pass sentence; but because it authorizes a police court to punish by confinement in the state prison, both for aggravated and simple larceny. It follows, of course, that the jurisdiction, under which the petitioner was sentenced, was not legally conferred on the police court, and therefore that he is not legally liable to be held under the commitment, and, on these facts appearing on a return of the *habeas corpus*, he will be entitled to his discharge from confinement.

THOMAS, J. Concurring, for the most part, in the opinion expressed by the majority of the court, and in the result to which it leads, I have been brought to the same conclusion by a somewhat different, and, to myself, more satisfactory course of reasoning. This I have felt it my duty briefly to state, the more especially as I am obliged respectfully, but firmly, to dissent from some of the constitutional views to which the opinion just read has given the sanction of the court.

The construction of the statute seems to me very plain. By the terms "all larcenies" are embraced aggravated as well as simple. The limitation in the statute is only in the amount charged to be stolen.

It seems to me equally clear, however difficult it may sometimes be to draw the line between punishments that are infamous and those not infamous, that punishment in the state

prison, the highest punishment known to the laws except that of death, and the only punishment now existing for crimes but recently punishable with death, is an infamous punishment. I concur also in the opinion that the citizen cannot be subjected to trial for an offence visited by a capital or infamous punishment, without the intervention of a grand jury, which, standing between him and the power of the government and the passions of the prosecutor, shall say, upon their oaths, that there is good cause why he shall be subjected to trial.

But there is, to myself, plainer and more solid ground upon which the conclusion rests, that a police court or a justice of the peace cannot be clothed with jurisdiction to try the citizen for an offence which will subject him to a capital or infamous punishment.

It is obvious to remark that, if the intervention of a grand jury is all that is wanting to the validity of this jurisdiction, the legislature might at once provide for the return of indictments into the police court, and, reserving to the accused the right of appeal, might subject him to trial even for his life, before a single magistrate. I find it impossible to assent to any such conclusion, or to any reasoning that would lead to it.

It seems to me plain that, when the Constitution declares that "the legislature shall not make any law that shall subject any person to a capital or infamous punishment, excepting for the government of the army and navy, without trial by jury," its meaning is trial by jury when and wheresoever he shall be tried; not upon his second trial, nor after having been subjected to another and different mode of trial. If, for an offence subjecting him to capital or infamous punishment, the citizen may be tried once without a jury, it is not easy to see why he may not be so tried a second time; why the legislature may not provide that, upon appeal to the municipal court, he may be tried by a single judge, and postpone his trial by jury to his appeal to this court. Such a law would, indeed, clog and obstruct his trial by jury; but the difference between that and this is in degree only.

The subjecting the accused to one trial by a single magistrate

obstructs the right of trial by jury, and essentially impairs its value. It places between the accused and a trial by jury a barrier not necessary for the security of the public, such as are the preliminary examination and the holding to bail. It interposes unnecessary delay between the accusation and trial by his peers. It subjects him to unnecessary and often fatally burdensome expense before he can reach the tribunal by which it is his right and his security to be tried. The subject cannot be said, under such a law, to obtain his right "freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay."

When you state the proposition that a man may be constitutionally tried for murder by a justice of the peace or a police court, or by any single judge, even after indictment, and that he cannot have a trial by jury until he has been tried by a single magistrate, I think every mind familiar with the Constitution, and with the common law rights secured by it, shrinks from the conclusion; yet it is to be observed, that the twelfth article of the Bill of Rights makes no distinction between laws subjecting the citizen to capital and those subjecting him to infamous punishments. They stand on the same ground.

I am aware that in some text-writers of authority, and in the *dicta* of judges for whom I feel the highest respect, it has been said, that if there is an unobstructed and unclogged right of appeal to a court in which a trial by jury can be obtained, the article of the Bill of Rights is satisfied. To this view I answer,

1st. That it has never been decided in this commonwealth, that the right of trial by jury, secured by the twelfth article of the Bill of Rights for offences subjecting the citizen to capital or infamous punishment, is satisfied by a right of appeal to a court sitting with a jury; but that, on the other hand, the practical construction of this article, by all departments of the government, has been, that in relation to the higher grades of offences (in which aggravated larcenies would be included) the subject must be indicted before he can be tried, and, when indicted, can be tried only by his peers.

2dly. That it is not an unobstructed and unclogged right of

appeal, which the twelfth article secures, but an unobstructed and unclogged right of trial by jury.

In the facts that, in relation to minor offences, a different usage has obtained, both before and since the adoption of the Constitution; that when the jurisdiction of the magistrate has been extended, the grade of the offence has been reduced and the punishment diminished; that since the adoption of the punishment in the state prison no magistrate has been charged with original jurisdiction of an offence which would subject the accused to this mode of punishment, till this statute was passed — a period of forty three years — I find the strongest evidence of what has been the practical understanding of legislators and magistrates. But I feel it my duty to say that, if exceptions to this practice had been found, yet, in a matter so vitally affecting the rights of the citizen, and the mode of trial by the preservation of which in its integrity those rights can alone be secure, I should still have adhered to what seems to me the plain and obvious meaning of the Constitution itself.

With this construction of the last clause in the twelfth article of the Bill of Rights, I am of opinion that the statute giving the police court jurisdiction of aggravated larceny, with power to punish the prisoner by confinement in the state prison, is invalid, for two reasons: first, because it subjects the citizen to trial for an offence visited with infamous punishment, without presentment by a grand jury; and second, because it gives to a single magistrate power to try for an offence which can only be constitutionally tried by a jury.

MERRICK, J. Upon the principal question in the present case, I am unable to concur in the opinion expressed by a majority, and indeed by all, the other members of the court. As the effect of that opinion is a denial of the constitutional right of a coördinate branch of the government to exercise a power which, after mature reflection, I cannot doubt that it possesses, I deem it to be my duty, profoundly as I respect the judgment of my associates, and distrustful as I ought to be of my own, to state the grounds of my dissent, and the reasons by which I am led to a conclusion different from and opposite to theirs.

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The petitioner is in the custody of the keeper of the house of correction, in execution of a sentence awarded against him by the police court of the city of Boston. He alleges that his imprisonment is without warrant of law, because the police court had no jurisdiction of the offence charged against him, as it is set forth in the complaint upon which he was tried, convicted and sentenced. If, upon inspection of the record, this appears to be true, he is entitled to relief, and should be discharged from imprisonment, upon being brought before this court upon a writ of *habeas corpus*. *Herrick v. Smith*, 1 Gray, 49.

From examination of the record it appears that a complaint, in due form and duly sworn to, was made to the police court of the city of Boston against the petitioner, wherein he was charged with stealing in a shop, there situate, certain property, of the value of fifteen dollars; that he was brought before that court, and there was arraigned, tried and found guilty of the charge set forth in the complaint; that he claimed no appeal from the judgment rendered against him, and that thereupon, in pursuance of that judgment and conviction, he was sentenced to be punished for the offence whereof he stood convicted, by imprisonment in the house of correction for the term of six months.

By the *St.* of 1855, c. 448, § 1, it is provided, that "the several police courts of this commonwealth shall have concurrent jurisdiction with the municipal court of the city of Boston and the court of common pleas, of all larcenies whereof the money or other property stolen shall not be alleged to exceed the value of fifty dollars; in all which cases the punishment imposed may be such as the court of common pleas and municipal court are authorized to inflict by existing laws." There is no doubt but that the last named courts have jurisdiction of offences of the like kind as that charged against the petitioner; and are authorized to sentence persons convicted thereof to the punishment of imprisonment for a term not exceeding three years in the house of correction, or for a term not exceeding five years in the state prison. *Rev. Sts.* c. 126, § 14; c. 143, § 19.

Upon consideration of the provisions of the *St.* of 1855, *c.* 448, all the members of the court are of opinion, for the reasons fully stated by the chief justice, that it embraces aggravated as well as simple larcenies. It does therefore expressly confer upon police courts authority to take cognizance of, and to hear and determine, all cases in which parties shall, in due form of law, and according to the known recognized and established course of proceeding in those tribunals, be brought before them, charged with the commission of any aggravated larceny by the stealing of money or property, the alleged value of which does not exceed the sum of fifty dollars; and at their discretion, upon the conviction of the accused party upon such charge, to sentence him to be punished by imprisonment for a term of years not greater than the period prescribed by law, either in the state prison or in the house of correction. If this statute is a valid and obligatory enactment, the petitioner has been lawfully tried, convicted and sentenced, and is not entitled to be relieved from his imprisonment.

But it is objected that this statute is inoperative and void, because it confers power upon police courts to sentence persons convicted of certain aggravated larcenies to the punishment of imprisonment in the state prison. It is contended that, by reason of the restrictions upon the general authority with which it is invested by the Constitution, it is incompetent for the legislature to make any law under or by force of which an alleged offender may be arrested, held to answer, tried, convicted and sentenced for the commission of a crime, the punishment of which may be by imprisonment in the state prison, without an indictment, or a presentment therefor by a grand jury, previously found and returned against him.

This objection to the validity of the *St.* of 1855, *c.* 448, is sustained by a majority of the members of this court, in whose judgment the proposition upon which it is founded is a legitimate and necessary inference from the provisions of the Constitution. I am unable to come to any such conclusion. On the contrary, it appears to me that the constitutional power of the legislature is not subject to any such restriction; but that it

possesses plenary authority to determine, by general laws, the manner in which, and the persons, officers or agents of the government, by whom, criminal accusations against alleged offenders, upon which they may be held to answer, tried, and, if convicted, sentenced for any crime or misdemeanor, may or shall be instituted or commenced. If this is correct, it is competent for the legislature, at its pleasure, to dispense altogether, or, in relation to any specified class of crimes, with the action and services of a grand jury, and to substitute in its place, and with all its powers, any other agency, either of single persons acting in their individual or official capacity, or of such associated bodies as may be constituted public prosecutors or conservators of the peace.

Of course I shall be understood as speaking only of the power and capacity of the legislature in the enactment of general laws; and not as expressing any opinion in relation to the expediency of continuing or abolishing the institution of a grand inquest. That is a topic which belongs to the deliberations of the legislature, and not to the judicial department of the government.

To determine the extent and reach of the authority of the legislature in the enactment of new laws and statutes, it is of course necessary to resort directly to the constitution itself, from which all its power is derived. We there find that full power and authority is expressly given to the general court, from time to time, as the members of whom it shall be composed shall judge to be for the good and welfare of the Commonwealth, to make, ordain and establish all manner of wholesome and reasonable orders, laws, statutes and ordinances, either with penalties or without, so only that they be not repugnant or contrary to the constitution itself. Const. c. 1, § 1, art. 4. And the general court is also, in like manner, further invested with similar power and authority to erect and constitute judicatories and courts of record and other courts, to be held for the hearing, trying and determining of all manner of crimes and offences, and of all pleas, processes, actions and causes, whether criminal or civil, and for making out and awarding execution thereon. art. 3.

There are undoubtedly some restrictions imposed upon the powers conferred in these broad and general terms. And it is contended that, by virtue of one of the several provisions contained in the 12th article of the Bill of Rights, the legislature is prohibited from enacting any law under which an alleged offender may, without a previous indictment or presentment of a grand jury, be arrested and held to trial upon the charge of having committed a criminal act, for which imprisonment in the state prison is prescribed as the punishment. It is there declared that "no subject shall be arrested, imprisoned, despoiled or deprived of his property, immunities or privileges, put out of the protection of the law, exiled, or deprived of his life, liberty or estate, but by the judgment of his peers or the law of the land." This is the only passage or provision in the constitution cited or relied on as having any tendency to show the existence of the supposed prohibition.

It is contended that the phrase "or by the law of the land" means, when duly interpreted, "by indictment or presentment of a grand jury." If this is the legal signification of those words, then certainly the legislature is prohibited from enacting a law like that under which the petitioner is held in custody in execution of his sentence; or, as it seems to me, any other law by force of which, without the preliminary action of the grand inquest, any subject may, for any crime or offence, be arrested, or imprisoned, or deprived of his life, liberty or estate. But if these words are not so to be interpreted, there is no restriction upon the power of the legislature to enact new laws respecting the way and manner in which criminal suits and prosecutions shall be instituted; and that department, under the general authority with which it is invested, is left perfectly free to introduce such changes, and make such new provisions on the subject as shall, from time to time, be deemed to be for the good and welfare of the Commonwealth.

It is not suggested that the words "or by the law of the land," when considered in the sense in which they are commonly and ordinarily used, import "by indictment or presentment of a grand jury"; but that, in consequence of their known usage as

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a legal expression, and the technical character they have thus acquired, that signification ought to be attached to them, in the connection in which they are found in the Bill of Rights. The usage of writers and speakers in particular departments of learning or branches of business undoubtedly often diverts the meaning of words and phrases from that which they import in their common and ordinary use; and the law not unfrequently thus assigns a peculiar signification to words, when they are found in legal treatises, or availed of for legal purposes. But tried by this latter standard, I do not see that the phrases "by the law of the land," and "by indictment or presentment of a grand jury," have ever been regarded as equivalent expressions, or that they have ever been adjudged to signify only one and the same idea.

Some legal authorities are referred to, as tending to show that, under a just legal interpretation, this is the meaning of that phrase, as we find it in the twelfth article of our Bill of Rights. The same words are contained in c. 29 of *Magna Charta*, from which the declaration in our bill of rights is derived. In his commentaries upon that chapter, after quoting the words "*nisi per legem terra*," "but by the law of the land," Lord Coke says: "For the true sense and exposition of these words, see the statute of 37 Edw. 3, c. 8, where the words, 'by the law of the land' are rendered, 'without due process of law'; for there it is said, 'though it be contained in the great charter, that no man be taken, imprisoned or put out of his freehold, without process of the law'; that is, by indictment or presentment of good and lawful men, where such acts be done in due manner, or by writ original of the common law." 2 Inst. 50.

This passage, I think, does not show that Lord Coke meant to affirm that the words, "by the law of the land," signify merely "by indictment or presentment of good and lawful men." He rather refers to one of the then well known modes of prosecution as an instance of the manner in which proceedings might be had "by due process of law"; to which he immediately adds, as a further illustration of what may be done by due process, "or by writ original of the common law." In his further

observations upon the same words, he says: No man can be put to answer without presentment before justices, or thing of record, or by due process, or by writ original, according to the old law of the land." The careful enumeration of these four separate methods, each of which might be resorted to, to compel a party to answer, seems clearly to indicate that the writer had no intention to give to this phrase, "the law of the land," the restricted signification which is supposed. What he afterwards says upon the same subject is still stronger to the same effect. "Now here it is to be known," he says, "in what cases a man, by the law of the land, may be taken, arrested, attached or imprisoned, in case of treason and felony, before presentment, indictment, &c." 2 Inst. 51. And again: "Now seeing that no man can be taken, arrested, attached or imprisoned, but by due process of law, and according to the law of the land, these conclusions," in respect to the character and contents of warrants and legal processes which he particularly points out, "hereupon do follow." 2 Inst. 52. The implication from these passages is certainly very strong, that the phrase "the law of the land," as it is used in the great charter of liberties, was not understood by Lord Coke to be synonymous with "indictment or presentment by a grand jury." See also Care's English Liberties, (Boston ed. 1721,) 25. This may be said with the greater confidence, since it is well known that, by the common law, there were various modes of instituting criminal prosecutions, quite distinct and separate from the action and presentment of the grand inquest, of which it is not possible to suppose that he could have been ignorant. For it is said by Sergeant Hawkins, "it is every day's practice, agreeable to numberless precedents, to proceed by way of information, either in the name of the attorney general, or of the master of the crown office, for offences done principally to a private person; as for batteries, cheats, seducing a young man or woman from their parents for any wicked purpose, perjuries, forgeries, conspiracies; as well as for offences done principally to the king, as for libels, seditious words, riots, extortions, nuisances," and various other enumerated offences. 2 Hawk. c. 26, § 1. Bac. Ab. Information, B

Of recent commentators, whose opinions have been supposed, erroneously as it seems to me, to sanction the doctrine that, under the provisions of *Magna Charta*, a presentment by the grand inquest is essential to the legality of all criminal prosecutions, or at least in relation to those wherein the convict may be subjected to an infamous punishment, reference has been made to Mr Justice Story and to Chancellor Kent. In his Commentaries on the Constitution of the United States, the former, after noticing other parts of the fifth article of the amendments, observes, that the declaration that no person shall be deprived of his life, liberty or property, "without due process of law," is but an enlargement of *Magna Charta*, "*nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terræ.*" And, after quoting what is said by Lord Coke concerning the sense and exposition of these latter words, he adds, "so that this clause affirms in effect the right of trial according to the process and proceedings of the common law." Story on Const. U. S. §§ 1783. This language is somewhat loose and indefinite; and the precise meaning of the author may not therefore be perfectly understood. But certainly he could not have intended by this to assert that the terms "presentment by the grand inquest" and "by due process of law" were of one and the same import and signification; since the article of amendment, upon which his discussion is founded, mentions them both, and makes a manifest and marked distinction and contrast between them.

The commentary of Chancellor Kent, when fully considered, does not seem to admit of the supposition that he assigns to the phrase "by the law of the land" the circumscribed and narrow signification, to which it is limited when held to be only a designation of one particular method in and by which a person may be legally accused of, and prosecuted for, a criminal offence. He says, indeed, that these words, "as used originally in *Magna Charta*, are understood to mean 'due process of law,' that is, by indictment of good and lawful men; and this, says Lord Coke, is the true sense and exposition of those words." But to prevent the reader from misapprehending it to be his intention to

assert, or admit, that this special instance and illustration should be accepted as a statement of the principle, he immediately adds: "The better and larger definition of 'due process of law' is 'law in its regular course of administration, through courts of justice.'" 2 Kent Com. 13.

There are many cases in which this definition of Chancellor Kent is directly or incidentally sanctioned; but there are none, which I have been able to find, in which the phrases "by the law of the land" and "presentment by a grand jury" have been adjudged to be equivalent or synonymous terms. Thus in *Taylor v. Porter*, 4 Hill, 140, it was held, that a statute authorizing a private road to be laid out across the land of a person, without his consent, was unconstitutional and void, because even the right of eminent domain cannot be exercised except under a general law, interpreted and administered in the due course of proceeding in courts of justice. The words "due process of law," said Mr. Justice Bronson, "cannot mean less than a prosecution or suit, instituted and conducted according to the prescribed forms and solemnities, for ascertaining guilt, or determining the title to property. It will be seen that the same measure of protection is extended to life, liberty and property; and if the latter can be taken away without a forensic trial and judgment, there is no security for the others." It is the forensic trial, under a broad and general law, operating equally upon every member of our community, which the words "by the law of the land," in *Magna Charta*, and in every subsequent declaration of rights which has borrowed its phraseology, make essential to the safety of the citizen, securing thereby both his liberty and property, by preventing the unlawful arrest of his person or any unlawful interference with his estate. *Jones v. Perry*, 10 Yerg. 59. *Wally v. Kennedy*, 2 Yerg. 554. *In re John & Cherry Streets*, 19 Wend. 676. *Hoke v. Henderson*, 4 Dev. 15.

There is evidence in the legislative action of the Province, that, long before the adoption of the Constitution, the people dwelling here were not disposed to rest wholly upon *Magna Charta*, or on the great body of English liberties. They made

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a declaration for themselves. The rights and liberties of the freemen of the province were set out in one of the earliest acts of the legislative assembly under the provincial charter; and although that act was annulled by an order of the King in council as soon as it was reported and known to the imperial government, and was never afterwards in force or recognized as having any legal effect or authority, it is none the less indicative of the opinions which were then here entertained upon the subject. In that declaration, the distinction between "the law of the land," or, as it is there expressed, "the law of the province," and "presentment by a grand jury" was made the basis of distinct and separate propositions. It was first provided that no freeman should be taken, imprisoned, outlawed, passed upon, adjudged or condemned, "but by the judgment of his lawful peers, or the law of this province"; and then followed the further distinct and independent provision, that "in all capital cases there shall be a grand inquest, who shall first present the offence." Anc. Chart. 214. This last provision, so cautiously inserted and so explicit in determining what should be the sole mode of prosecuting offences of the highest grade, was wholly futile and unnecessary, if the "law of the land" meant exactly the same thing as "the presentment of a grand jury."

When the Constitution of this commonwealth was written, the words "*per legem terræ*" from *Magna Charta* were selected and inserted in the twelfth article of the Bill of Rights, instead of transferring to it the peculiar phraseology of our provincial declaration. The signification of each form of expression, however, was the same. This is apparent from several considerations. A few years later, the Constitution of the United States, framed in a convention of delegates from the several independent sovereignties then existing, was submitted to the people of Massachusetts for their adoption. It is well known to have been in the convention, to whose deliberations its acceptance or rejection was referred, one serious ground of objection to its adoption, that it contained no provision for the security of the citizen against the danger of public criminal prosecutions. To obviate that objection an amendment was proposed, which was subse-

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quently accepted by the requisite number of states, and now forms part of the Constitution, providing "that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land and naval forces, or in the militia when in actual service in time of war or public danger." This is explicit; and I think that the fact of the incorporation of this amendment into the Constitution clearly shows that, at that time, the words, "by the law of the land" had not acquired, and were nowhere understood to have the meaning of those other words, "by indictment or presentment of a grand jury." For, if such was known and understood to be the settled, technical and legal meaning and signification of those words, as used in their bill of rights, the people of Massachusetts, when seeking for security and demanding protection against prosecutions for capital or other infamous crimes under the authority and laws of the United States, would naturally, and almost necessarily, have used and availed themselves of the same comprehensive and expressive terms which, for a like purpose, they had incorporated into their own constitution. But it was not so. And in looking at the report of the debates in the convention, to see how this subject was then treated and considered, it is apparent that no one then supposed that there was any provision in the Bill of Rights, or in any part of the Constitution of Massachusetts, relative to the existence or the action of a grand jury. It was said, during the discussion upon this subject, and obviously with studied caution and upon careful reflection, by Mr. Gore, one of the ablest lawyers and statesmen of that day, that "no provision is made in the Constitution of Massachusetts for an indictment by a grand jury, or to oppose the danger of an attorney general filing informations." This broad statement appears to have been universally acquiesced in; not an individual expressed a different opinion, or intimated any suggestion that such a provision existed by force of, or could justly be derived from, the principles asserted in the twelfth article of the Bill of Rights, or might be derived from any peculiar signification which ought to be attached to the words "by the

law of the land." Debates in Convention of 1788, (ed. of 1856,) 214.

Considering the time, the place and the circumstances under which this opinion was expressed, and that not one of the able and vigilant members of the convention in which it was clearly and distinctly asserted then intimated the least doubt of its correctness, it deserves to be considered as a deliberate judgment, and is entitled to the weight of an authoritative contemporaneous exposition of the sense and meaning of this particular article in the Bill of Rights and of the general provisions of the Constitution. It was undoubtedly so considered at that time; and it appears to have been ever since tacitly acquiesced in and conceded. It has not hitherto been denied or brought into question in any controversy which has arisen, or by any adjudication in our courts of law. On the contrary, so far as our judicial decisions have gone, upon questions involving this inquiry, they tend rather to strengthen, support and confirm it. It was thus in the judgment upon an information filed by the solicitor general against the inhabitants of Waterborough, for neglecting to be provided with a public protestant teacher of piety, religion and morality. In giving the opinion of the court in that case, Parsons, C. J. says: "It is a general rule that all public misdemeanors, which may be prosecuted by indictment, may be prosecuted by information in behalf of the Commonwealth, unless the prosecution be restrained by statute to indictment." *Commonwealth v. Waterborough*, 5 Mass. 259. And in a later case this opinion was incidentally affirmed. Judgment appears to have been actually entered upon a verdict rendered upon an information filed and prosecuted in the county of Suffolk by the attorney for the Commonwealth; and sentence awarded thereon for the penalty prescribed by statute as the punishment of an act prohibited and made criminal. Various other exceptions were taken and argued in behalf of the defendant; but neither his counsel nor any one else seems to have entertained a doubt of the right of the government to maintain the prosecution, because it was not founded upon the presentment of a grand jury. *Commonwealth v. Hooper*, 5 Pick. 42.

This precise question was brought most distinctly to the attention of the Convention assembled in 1820 to revise the Constitution of the Commonwealth. And it is obvious, from all the proceedings which took place in relation to it — from the debates, the resolves adopted, and the final action of the convention — that it was the unanimous opinion of all the delegates, that there was then no existing provision in the Constitution, requiring a presentment by the grand inquest as the foundation of a criminal prosecution. A resolution was offered, proposing to amend the Declaration of Rights, so that no person should be liable to be tried for an offence, the punishment of which should be imprisonment, or otherwise ignominious, but upon the presentment of a grand jury. Mr. Parker of Boston, then the chief justice of this court, “said, it was remarkable that, when the Constitution was drawn up by persons so careful of the rights of the citizen, no provision was made to guard them in this particular. The common law is in force here, and by it the attorney and solicitor general had authority to file informations in cases under felony.” It is worthy of observation, and material in this connection, to consider, that it was then perfectly well known that there were many offences below the grade of felony, of which the law took cognizance, such, for example, as forgery and perjury, which might thus be prosecuted upon the mere information of the law officers of the government, and which, by the express provisions of the statutes of the Commonwealth, subjected convicts to infamous punishment, and to imprisonment and confinement to hard labor in the state prison. *Sts.* 1804, c. 120, § 1; 1812, c. 144, § 5. Mr. Parker “proceeded to state the probable reasons, founded on some provincial laws to which he referred, why the provision was not made in the Constitution, and to state more at large the reasons why it should be made now.” Some of the delegates objected, for various reasons, which they assigned, to the adoption of the resolution; but no one of them denied anything that was said by Chief Justice Parker, or attempted to point out any statement or clause in the Constitution, which required the action or existence of a grand jury. The resolution was adopted; and

finally the convention prepared an amendment of the Constitution, founded upon it, in these words: "No person shall be subjected to trial for any crime or offence for which, or on conviction thereof, he may be exposed to imprisonment, or to any ignominious punishment, unless upon a presentment or indictment by a grand jury; except in cases which are or may be otherwise expressly provided for by the statutes of the Commonwealth." No direct vote was ever given by the people upon this single proposition. The amendment was united with another, upon a very different subject, which proved not to be acceptable to them, and both were rejected by the popular vote. But it is difficult to see how there can be any stronger evidence than is to be found in the deliberations and expressed opinions of the members, and in the final action of the convention, that down to that period in the history of the Commonwealth, it was nowhere understood or supposed that, under a just interpretation of any clause in the Bill of Rights or other part of the Constitution, a preliminary investigation and presentment by a grand jury were indispensable to the legal validity of a criminal prosecution. Debates in Convention of 1820, (ed. 1853,) 467, 468, 572, 614, 633.

Evidence to the same effect is also afforded in various acts of legislation under the Constitution, and in the practical construction thus given to its provisions. Soon after, but nearly contemporaneously with its adoption, courts of general sessions of the peace were established, and empowered to hear and determine all matters relative to the conservation of the peace, and the punishment of the offences of which they were authorized to take cognizance. The jurisdiction of those courts was very broad; extending, as it has since been judicially ascertained and determined, to everything which, in the then existing state of the law, did not relate to life, member or banishment. *Commonwealth v. Holmes*, 17 Mass. 336. Yet in the statute by which they were created, express provision was made concerning the issuing of warrants and processes "for the apprehending and bringing to trial any person against whom an indictment is found or a complaint filed, for any crime" whereof the

court was capable of taking cognizance; thus treating these two modes of proceeding — by indictment and by complaint — as of equal force and validity, and declaring, by an inevitable implication, so far as it was competent for the legislature to declare, that, under the Constitution, a criminal prosecution may be legitimately instituted and pursued, and the alleged offender brought to trial, and, if convicted, subjected to punishment, as well without, as with the intervention and presentment of a grand jury. *St.* 1782, c. 14, §§ 1, 2. Other provisions are not less significant. Informations are recognized as well known and legal processes, by force of which, in the recovery of forfeitures incurred under penal statutes, individuals may lawfully be deprived of portions of their property or estate. *St.* 1788, c. 12, § 1. And in some instances the privilege of an election has been given of resorting to that mode of proceeding, or to a prosecution by indictment, for the recovery of penalties prescribed as the punishment of acts prohibited by law; as in the case of selling, or offering or advertising for sale, tickets in lotteries, not authorized by the laws of this commonwealth, when the maximum of forfeiture was fixed at two thousand dollars. *Sts.* 1825, c. 184, § 1; 1833, c. 148, §§ 1, 2. The third section of the statute last cited goes much further, affecting not only the property, but also the liberty of the citizen. It first provides that any person convicted of any one of the several offences therein enumerated shall be punished by imprisonment and confinement to labor in the state prison for a term not less than one nor more than three years; and it then proceeds to determine what shall be the effect of a particular species of evidence, if produced upon a trial, “of any prosecution, whether by indictment or by information;” thus incidentally, but distinctly, recognizing the latter as a mode of prosecution equally as legal and effectual as the former, and upon which a convict may be sentenced to suffer the most severe and rigorous imprisonment authorized by law.

Similar illustrations might be adduced, if it were necessary to pursue the inquiry, from the various statutes in which judicial power and authority in criminal cases is conferred upon inferior

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tribunals — upon police courts and justices of the peace. All prosecutions before police courts or justices of the peace are necessarily instituted by complaint, upon the oath of the party by whom it is made ; and never by a formal presentment because grand jurors are never in attendance upon these courts. Yet they are fully empowered to hear and determine many criminal cases ; to cause accused parties to be brought before them for trial ; and, upon conviction, to sentence them to punishment by the payment of fines or suffering imprisonment either in the common jail or in the house of correction.

In another and more striking form the legislature has very deliberately indicated an opinion as to its right to determine, at its discretion, in what class of offences the presentment of a grand jury shall be indispensable to the institution of a criminal prosecution, and how far, and upon what occasions, the old common law process of information shall be allowed in its place. Upon the revision of the statutes in 1836, the commissioners — stating in a manner which makes it apparent that they did not suppose that their proposition could be exposed to any doubt or disputation, that “ our constitution does not mention an indictment ” — proposed that a law should be enacted, that no person should be held to answer for any crime or offence punishable by the infliction of death, or by imprisonment in the state prison, unless upon indictment by a grand jury. Commissioners’ Report, c. 123, notes. The committee of amendments, to whom this recommendation was first referred, followed out the principle of the suggestion ; but, varying the form and substance of the proposed law, so as at once both to uphold, and to show what was understood to be the extent of the constitutional right of the legislature, reported the section of the statute, which was finally enacted, declaring therein that no person should be held to answer, in any court, for an alleged crime or offence, unless upon an indictment by a grand jury ; except where a prosecution by information should be expressly authorized by statute, and in proceedings before police courts, justices of the peace and courts martial. Committee’s Amendments, 149. Rev. Sta. c. 123, § 1.

This clear and distinct reservation of the right to authorize, in whatever cases it should choose to do so, the institution of criminal prosecutions by information, is a manifest denial that the Constitution, by any of its provisions, had subjected the power of the legislature, on this subject, to any restraint or limitation. They who constituted its members when this statute was enacted, could not possibly have understood that, according to the principles set forth in the 12th article of the Bill of Rights, no citizen could be arrested, imprisoned or deprived of his liberty nor of his estate, but by indictment or presentment of a grand jury; for the exact opposite of all this, was provided for by them in the law which they thus sanctioned and established.

It was in the exercise of that power, then so plainly and significantly claimed and asserted by the legislature as its undoubted right, that the statute now under consideration, by force of which the petitioner is held in custody, was enacted. Under the general authority conferred upon it, by the broadest terms, by the Constitution, it was certainly competent for the legislature to ordain and establish such a law, unless by some provision in another part of the same instrument, that authority is specially, or by necessary implication, so curtailed and limited as to forbid or disallow it. And confessedly no such restraint exists, if the phrase, "by the law of the land," in the 12th article of the Bill of Rights — the only clause referred to or supposed to import such limitation — is not to be interpreted, at least in relation to all offences to which an infamous punishment, such for example as imprisonment in the state prison, is attached, as a prohibition against the enactment of any law, by force of which the life, liberty or property of a citizen may be jeopardized through the prosecution of any criminal accusation against him, other than such as shall be founded upon the presentment and action of a grand jury. I can see no sufficient reason for adopting such an interpretation. On the contrary, in view of the considerations already presented, whether the phrase is considered in reference to the usual and ordinary signification of the words of which it consists, or to any legal or technical

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meaning which, in the course of time, they may have acquired, or in the light of any judicial decision hitherto promulgated, or according to the understanding which has long and widely, if not indeed universally, prevailed among statesmen, jurists and legislators upon this subject, it appears to me that such an interpretation is erroneous and unwarranted.

But a further and definite objection is urged against the validity of this statute. In conferring upon police courts jurisdiction of all larcenies, where the alleged value of the stolen property does not exceed fifty dollars, it gives them also power to sentence convicts, for certain of the offences embraced in it, to imprisonment in the state prison. And it is insisted that, this being an infamous punishment, the legislature is not authorized to empower those inferior tribunals to subject persons under judgments rendered by them to punishments of such a description. It is impossible, I think, upon a just and reasonable construction of any part or provision of the Constitution, to maintain that objection. If, disregarding the great and fundamental question of constitutional authority and right, we were at liberty to advert to other considerations, it might perhaps be thought to have been inexpedient and injudicious to clothe the judicial officers appointed to administer justice in those courts, with powers of such magnitude and importance. And it is possible that, in the enactment of the particular statute under consideration, the most careful and deliberate attention was not directed to the measure and extent of the punishment which may be inflicted by virtue of its provisions. But if it were allowable to enter into speculations of this kind, nothing could be found in them sufficient to invalidate a law otherwise duly enacted. The legislature alone has the right, and it is moreover its especial duty, to decide definitively upon this and all kindred questions of expediency in establishing laws and ordinances for the common welfare. The material inquiry here however has no relation to the utility or expediency of particular acts of legislation, but is limited and confined to the question concerning the constitutional power and right of the legislature in the enactment of laws declaring in what manner criminal accusations shall be

instituted, what punishments may be imposed upon parties convicted of specified offences, and in what tribunals such punishment may be awarded. And upon the most careful scrutiny of the Constitution, it will be seen that it nowhere makes any distinction whatever between offences or designated classes of criminality, in relation to the method, form or manner in which criminal prosecutions concerning them shall be commenced. Nothing of that kind is prescribed in the organic law, but the whole subject of process and course of procedure in judicial tribunals is left to the future regulation of the legislature in the exercise of its general and independent authority. If the phrase "by the law of the land" were to be construed as if it was precisely equivalent to the expression "by presentment of a grand jury," it is obvious that there then could be no difference or distinction in the origin and commencement of prosecutions against persons charged with the commission of different offences; for, upon such an interpretation, the preliminary action of a grand jury would be indispensable to any and every criminal prosecution, and must be resorted to and relied upon indiscriminately in reference to all crimes and offences of every grade and description. But if this is not a just interpretation of that portion of the Bill of Rights, and if no such principle is to be deduced from it, then there is nothing to hinder the legislature from ordaining and defining, in and by statutes duly enacted, the method, form and course of proceeding in which breaches of the peace and violations of the criminal code may be pursued. The Constitution does declare, in clear and explicit terms, that the "legislature shall make no law that shall subject any person to a capital or to an infamous punishment, excepting for the government of the army and navy, without trial by jury." This most material provision is attached to and follows immediately after the declaration of the liberties and immunities of the citizen, as they are set forth in the twelfth article of the Bill of Rights, and constitutes an essential portion of it; so that any statute for the punishment of persons alleged to have been guilty of any crime or misdemeanor, without adequate provision for a trial by jury, must necessarily be invalid.

But in no other place, and in no other manner or particular, is infamous punishment mentioned or alluded to in the Constitution. It is there brought prominently into view and carefully specified, for the obvious purpose of ensuring to the citizen that the right of trial by jury upon every criminal prosecution, which can by possibility subject him either to a capital or infamous punishment, shall be inviolably pursued. But it goes no further than this. It does not allude, in the remotest degree, to the manner of instituting prosecutions, nor afford the least intimation that the kind, nature or degree of the punishment to be inflicted, is to influence, control or affect the method, process or course of proceeding against the party accused. So far from this, the very reverse appears to be an unavoidable conclusion. The mention of infamous punishment directly, but only in relation to trial by jury is, upon well settled principles of interpretation, an exclusion of its application to other purposes, or to other objects of a different character. *Expressio unius est exclusio alterius*. To make a provision which, by its own terms, is applicable solely to the manner in which a cause or an accusation shall be tried, exercise an absolute and controlling influence over the method, form or manner in which it shall be instituted or begun, is too wide a departure from the obvious import of language to admit of its being accepted as a true or just interpretation.

For these reasons I am of opinion that the St. of 1855, c. 448, is a valid and constitutional enactment; and consequently that the petitioner is not entitled to be discharged from his imprisonment.

NOTE. By St. 1857, c. 157, the St. of 1855, c. 448, is repealed; and concurrent jurisdiction is given to police courts to punish larcenies of money or property, not alleged to exceed fifty dollars in value, by imprisonment in the county jail or house of correction not exceeding two years, or by fine not exceeding one hundred dollars.

CYRUS HAPGOOD *vs.* FRANK DOHERTY.

A court whose jurisdiction is limited to "cases wherein the debt or damages demanded do not exceed" a certain sum, has jurisdiction of a case in which the *ad damnum* is that sum, although a larger sum is claimed in the declaration.

A statute extending the jurisdiction of justices of the peace to civil actions for the recovery of \$100 or less, and requiring any party appealing to give security for the prosecution of his appeal, and for costs, is not unconstitutional as infringing on trial by jury.

ACTION OF CONTRACT, commenced in the justices' court for the county of Suffolk, by a writ which contained a direction to attach goods to the value of \$200, and a declaration on an account annexed of \$123 for goods sold, and an *ad damnum* of \$100. The defendant pleaded to the jurisdiction of the court, that the claim sought to be recovered exceeded in amount the sum of \$100. But judgment was given for the plaintiff for the sum of \$100, and the defendant appealed to the superior court of Suffolk.

In that court, the parties agreed that the sum actually due from the defendant to the plaintiff was the \$123 claimed in the declaration, and submitted the case upon that fact and the pleadings and judgment below. The superior court gave judgment for the plaintiff for \$100, which was all he claimed; and the defendant appealed to this court.

B. Dean, for the defendant. 1. The *St.* of 1852, c 314, § 1, which extends the jurisdiction of justices of the peace, police courts and justices' courts, "to all civil actions wherein the debt or damages demanded do not exceed the sum of one hundred dollars," is to be construed strictly. *Bridge v. Ford*, 4 Mass. 641. *State v. Hartwell*, 35 Maine, 131. The "debt or damages," intended by the statute, is the actual amount of the debt or contract upon which the plaintiff seeks to recover, not the amount of the *ad damnum*, or the sum which he is willing to take in payment. *Peyton v. Robertson*, 9 Wheat. 527. *Winston v. United States*, 3 How. 771. *Ross v. Prentiss*, 3 How. 771. *Perkins v. Rich*, 12 Verm. 595. *Thompson v. Colony*, 6 Verm. 91.

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Southwick v. Merrill, 3 Verm. 320. *Sands v. Delap*, 1 Scam 168. *Swift v. Woods*, 5 Blackf. 97. *Chandler v. Davidson*, 6 Blackf. 369. *Gharkey v. Halstead*, 1 Ind. 389. *Elderkin v. Spurbeck*, 1 Chandl. 69. *Odell v. Culbert*, 9 W. & S. 66. *South v. Hall*, Coxe, 29. *Ancora v. Burns*, 5 Binn. 522. *Mills v. Couchman*, 4 J. J. Marsh. 242. Here the amount sued for, as appearing by the declaration, and agreed by the parties, is \$123. Even the payment of \$100, agreed to be in full satisfaction, would not bar an action for the residue. *Smith v. Bartholomew*, 1 Met. 277. *Brooks v. White*, 2 Met. 283. *Jackman v. Bowker*, 4 Met. 235.

2. The St. of 1852, c. 314, is unconstitutional, and contrary to the Declaration of Rights, art. 15, because it deprives the defendant of the right of trial by jury, except by appealing and giving sureties to pay the plaintiff's costs. Prov. St. 4 W. & M., Anc. Chart. 217. *Sts.* 1783, c. 42; 1797, c. 21; 1807, c. 123. *Greene v. Briggs*, 1 Curt. C. C. 325. *Sullivan v. Adams*, 3 Gray, 476.

P. Willard, for the plaintiff.

BY THE COURT. 1. Where the original jurisdiction of a court is limited to a claim for a certain amount in money in a case sounding in damages, that amount is to be ascertained by the *ad damnum* expressed in the writ. The plaintiff cannot recover beyond his *ad damnum*, and the judgment of the court cannot exceed it. Yet this judgment will be a bar to the whole claim. The case cited from Wheaton does not apply, because it was replevin, which draws in question the right to specific property, and the damage claimed is merely incidental, and no measure of the amount in controversy. The cases from Howard depend on a statute differently worded. The court are of opinion that if the plaintiff chose to waive the surplus of his claim, which was for goods valued at more than \$100 — which was perhaps more than he could have proved — he might do so, and bring his action in the justices' court.

2. It is a sufficient answer to the constitutional objection, that a trial by jury is secured to the defendant on appeal. *Jones v. Robbins*, ante, 341, and cases cited. *Exceptions overruled.*

COMMONWEALTH *vs.* HUGH TIVNON & another.

An indictment on *St.* 1853, c. 194, against two, for having in "their possession," on a certain day, certain tools and implements, designed and adapted for breaking open buildings, sufficiently charges a joint possession; and is supported by proof of the commission of the offence on any day before the finding of the indictment.

An indictment on *St.* 1853, c. 294, which alleges an intent to use the implements for the purpose of breaking open houses and shops, in order to steal from the owner thereof money and goods, need not describe the buildings intended to be broken open, nor the property intended to be stolen, nor name the owner of either.

An indictment on *St.* 1853, c. 194, is supported by proof that some of the implements described in the indictment were in the possession of the defendant, and adapted and designed for the unlawful purpose specified.

It is not necessary, to support an indictment on *St.* 1853, c. 194, that the tools or implements should have been originally made or intended for an unlawful use.

On the trial of an indictment against two, on *St.* 1853, c. 194, after proof of a common design or enterprise of the defendants, the declarations of one in relation to the joint enterprise are admissible in evidence against both.

An indictment on *St.* 1853, c. 194, is maintained by proof of possession, either actual or constructive, with the guilty intent. But proof of possession of implements by one defendant, both intending to use them in a joint undertaking, is not sufficient.

INDICTMENT ON *St.* 1853, c. 194, which provides for the punishment of "every person who shall knowingly have in his possession any engine, machine, tool or implement, adapted and designed for cutting through, forcing or breaking open any building, room, vault, safe or other depository, in order to steal therefrom any money or other property, knowing the same to be adapted and designed for the purpose aforesaid, with intent to use or employ the same for the purpose aforesaid."

The indictment alleged that Hugh Tivnon and James Johnson, on the 2d of November 1855, at Boston, "did feloniously and knowingly have in their possession certain implements, that is to say, thirty seven false keys, four skeleton keys, three wax key impressions, one pair of key forceps, one plate, one jimmy, two bitts, one bitt-stock, designed and adapted for forcing and breaking open houses, stores, shops, rooms, safes, trunks and vaults, in order feloniously to steal, take and carry away from the owner thereof, any money, and other goods and chattels therein found; they, the said Tivnon and Johnson, then and

there knowing the aforesaid implements to be designed and adapted for the purposes aforesaid, and with the intent then and there of said Tivnon and Johnson to use the same for the purposes aforesaid ; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided."

Tivnon pleaded guilty, and Johnson was tried in the municipal court at December term 1855, before *Abbott, J.*, who signed a bill of exceptions of which the following are the material parts :

"The Commonwealth's attorney offered evidence that Tivnon carried to his boarding-house certain implements as described in the indictment, and there had them in his separate possession ; also certain conversations of Tivnon, relative to said implements and their possession and use, but not in the presence or knowledge of Johnson. This was objected to by the defendant's counsel, on the ground that the defendant was charged with a felony, and not a conspiracy to commit a felony, nor a misdemeanor ; that as the government had elected to charge and make out a joint possession, it could only prove a joint and actual possession, and not a separate possession ; and that no possession of, or act done or word said by Tivnon, not in the actual presence or knowledge of Johnson, could be put in evidence against him. On the other side, it was claimed that the case was to be tried like a charge of conspiracy, and that the acts, sayings and possessions of one were the acts, sayings and possessions of both. The presiding judge overruled the objection, and admitted the evidence, after the government had offered evidence tending to show that both Tivnon and Johnson were engaged in a common enterprise, in which they intended to use some of the implements described, for the purposes described.

"The defendant's counsel also asked the court to rule that the government must offer some evidence to prove that the implements set forth were adapted and designed as alleged ; that, under the statute upon which this indictment was found, the said implements must have been made and designed originally for the purposes alleged, not such instruments as are made,

adapted and designed for honest and useful purposes ; that the jury, before they can convict, must be satisfied that the defendants had an actual joint possession on some particular day ; and that the implements must not only be designed and adapted for cutting through, forcing or breaking open, but that the intent of the defendants must have been to use them for said purposes, in a forcible manner, viz : by cutting through, forcing or breaking open.

“ But the court refused so to rule, and ruled that, in order to constitute the offence in question under this form of indictment, the government must make out the following propositions beyond all reasonable doubt :

“ 1st. That the defendant had in his possession some of the different articles, described in the indictment, within the county of Suffolk, at some time since the passing of the statute in question, before the finding of the indictment ; and that such articles were implements designed and adapted, at the time of such possession by the defendants, for the purpose of breaking open and forcing either houses, stores, shops, rooms, safes, trunks or vaults.

“ 2d. That, while so possessing said implements, the defendants knew that they were adapted and designed for the purpose of breaking or forcing open either houses, stores, shops, rooms, safes, trunks or vaults, and intended and designed to use the same for the purpose aforesaid, in order feloniously to steal from the owner thereof any money or goods and chattels to be found in said houses, stores, shops, rooms, safes, trunks or vaults, so intended and designed to be broken open or forced.

“ 3d. That the government having elected to go for a joint possession of both the parties indicted, the possession to be proved as aforesaid must be the joint possession of the defendant on trial and the other party indicted with him ; and that a joint possession would be constituted by showing that the implements in question were in the possession of either of the defendants, both of them participating in a common intent and design to use the same in a joint undertaking and enterprise of executing the several purposes aforesaid.

"4th. That under the election made by the government as aforesaid, any such possession of the implements aforesaid, with the intent and for the purposes aforesaid, by either of the defendants separately, such intent and purpose not participated in by both, would not be sufficient to entitle the Commonwealth to a verdict.

"In reference to what is necessary to constitute an implement described in the statute, the jury must be satisfied that some of the articles described in the indictment were implements or instruments from their character and description actually adapted to and capable of being used in the breaking open or forcing houses, stores, shops, rooms, safes, trunks or vaults, for the object set forth in the statute; and that while in the possession of the defendants they designed and intended to use them for that purpose; that it was not necessary that such articles should have originally been made, to be used for the purposes aforesaid; that the burden of proof was upon the government, to establish such adaptation and design from all the evidence in the case; and that, in passing on this question, the jury had a right to consider the character, form, make and materials of the implements themselves, as well as the purposes for which the defendants declared they intended to use them.

"Upon the character of the acts necessary to constitute the forcing or breaking open alleged in the indictment, the using of any degree of force to open a door, or window in, or remove any part of a house, store, shop or room, so as to make an entry, or to open a trunk, safe or vault, either by the use of a key, or any other instrument or implement, would be sufficient to constitute the breaking open and forcing, alleged to be intended and designed."

Johnson, being convicted, alleged exceptions to the rulings of the court. Both defendants also excepted to the overruling by the court of the following motion in arrest of judgment:

"1st. Because the indictment does not allege any joint possession by the defendants, or that they had all the said implements at one and the same time on any particular day.

"2d. Because there is no allegation that all of said implements were adapted and designed for the purposes set forth.

"3d. Because there is no description of the building, shop, &c., upon which such implements were to be used, whether in or out of the State, nor the name of the owner, whether known or unknown, nor of the property to be stolen, nor of the owner, whether known or unknown.

"4th. Because there is no allegation of an intent jointly to use said implements, as set forth."

J. H. Bradley, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

BIGELOW, J. 1. There is nothing in the nature of the offence with which the defendants stand charged, which renders it several, so that it cannot be committed in concert by two or more persons. It does not resemble perjury and other similar crimes, which must necessarily be the distinct act of one individual, in the commission of which another cannot join; but, like most criminal acts, it may well be the joint act of two or more. The possession of burglarious implements with a guilty intent is the gist of the offence set out in the indictment. Such possession may be joint as well as several; and where the guilty intent of several is manifested by their joint act, it becomes a joint offence. In such cases, by the well settled rule of criminal pleading, all who join in the commission of the act may be indicted either jointly or separately. 2 Hale P. C. 173. *Regina v. Atkinson*, 1 Salk. 382. The offence charged in the present case is analogous to that of having in possession counterfeit coin with a guilty intent, of which two or more persons acting in concert may be jointly indicted. *Regina v. Rogers*, 2 Mood. 85. *Regina v. Williams*, Car. & M. 259. The allegation in the indictment sufficiently sets forth that the tools or implements were in the possession of both the defendants, and charges a joint offence in apt words and according to the precedents.

2. As the offence charged in the indictment was one into which time did not enter as an essential ingredient, it was sufficient to allege it on any day after the passing of the *St.* of 1853, c. 194, which created the offence, and before the finding of the indictment. Under this allegation it was competent to prove the commission of one offence by both defendants on any

day after the statute took effect and before the indictment was found. Archb. Crim. Pl. (5th Amer. ed.) 40, 41.

3. The gist of the offence being the possession of the burglarious implements with an intent to use them for the purpose of breaking and entering a shop, building, safe or other depository of money or goods, in order to steal therefrom, it was sufficient to allege such possession with the guilty intent, without further specific averment. The offence was complete when the tools were procured with a design to use them for a burglarious purpose. A general intent was sufficient. It was not necessary to allege or prove an intent to use them in a particular place, or for a special purpose, or in any definite manner. In this respect, the offence charged is similar to that of having in possession counterfeit bills with intent to utter them as true. It is never necessary to aver or prove the time, place or manner in which the bills were intended to be uttered. Archb. Crim. Pl. 513.

4. The indictment properly charges that all the instruments or tools named therein were adapted and designed for the unlawful purposes specified. But it was not necessary to prove either that the defendants were possessed of all the implements described, or that all of them were designed or adapted to effect the objects charged in the indictment. The offence was the same, and the like punishment was prescribed, whether the defendants were found guilty of having in their possession, with an unlawful intent, any one or all of the implements specified. The number of articles alleged was therefore wholly immaterial. It was no variance if only one of them was proved to have been in the possession of the defendants as charged, and such proof was sufficient to constitute the entire offence set out in the indictment. Archb. Crim. Pl. 49.

5. Nor do we think it necessary, in order to create the offence which the statute is designed to punish, that it should appear that the tools or implements were originally made or intended for an unlawful use. If they are suitable for the purpose, so that they can be used to break and enter burglariously, it is wholly immaterial that they were also designed and adapted for

honest and lawful uses. A chisel or centre-bit, though a tool in common use for ordinary purposes, is quite as efficacious in the hands of a burglar to carry out his felonious intent, as a jimmy or a lock-picker, which is made for the sole purpose of being used to break and enter buildings.

6. A common design or enterprise between the defendants being first proved, it was clearly competent to admit the declarations of one of them, in relation to the joint undertaking, to affect both. This rule is not confined to cases where a conspiracy is charged, but it is applicable wherever a combination to effect a particular object is established. It rests on the principle that each is agent for the other in all matters relating to the common object, and the acts and declarations of one in furtherance of such object are admissible to affect the principal as well as the agent. 1 Greenl. Ev. § 111, and cases cited.

7. We have no doubt that proof of possession by the defendants of any of the implements named in the indictment, either actual or constructive, would be sufficient evidence to warrant a conviction, if accompanied by the guilty intent. But what is meant by constructive possession? It would be proved by evidence that the implements were held by one for himself and as agent for another; that they were jointly bought and owned, but kept by one only, or procured and held by one by mutual agreement or at the request of another; or that they were deposited in some place mutually agreed on, to which either could resort at pleasure. These and other instances which might be stated would constitute constructive possession.

But the instruction given to the jury in the present case on this point went further. It not only authorized the jury to convict the defendants on proof of a constructive possession, but it warranted a conviction of both, although there was evidence of possession, either actual or constructive, by one only. The instruction was, that the possession of one, both intending to use them in a joint undertaking, was the possession of both. The error in this proposition is, that it makes the guilty intent, without possession, the sole ingredient in the offence; whereas the statute punishes such intent only when it is connected

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with possession of the burglarious implements. Under the instruction given to the jury, a person might be convicted on proof that he intended to unite in a joint undertaking or enterprise to commit a burglary before any tools or implements were obtained for the purpose, although, when they were subsequently procured and in the possession of his associate, in order to carry out the preconcerted design, he had abandoned his unlawful intent and had then determined not to use the implements for the purpose for which they were obtained. We are therefore of opinion that there was a misdirection on this point, and that there must be a new trial. *Exceptions sustained.*

PATRICK GARVEY *vs.* COMMONWEALTH.

SAME *vs.* SAME.

SAME *vs.* SAME.

The *St.* of 1855, c. 215, § 15, does not authorize the increased punishment of a second unlawful sale of intoxicating liquors as a second offence, unless the fact that it is a second offence is alleged in the complaint or indictment.

THREE WRITS OF ERROR to reverse as many judgments of the court of common pleas in Middlesex on as many complaints against the plaintiff in error for unlawful sales of intoxicating liquors, in violation of *St.* 1855, c. 215, § 15.

The errors relied on were, that the sentence on the first complaint was to pay a fine of twenty dollars and costs, and be imprisoned thirty days; and, on each of the other two complaints, to pay a fine of fifty dollars and costs, and be imprisoned six months; whereas neither of the complaints alleged that the defendant had been previously convicted of a violation of said statute. But it was admitted that it appeared by the records of that court that the defendant had been convicted of a previous violation of that section at the same term.

S. A. Brown, for the plaintiff in error.

J. H. Clifford, (Attorney General,) for the Commonwealth.

BY THE COURT. This case is substantially settled by that of *Tuttle v. Commonwealth*, 2 Gray, 505, in which it was decided that the increased penalty provided in the *St.* of 1852, c. 322, § 7, for a second conviction of an unlawful sale of intoxicating liquors, could not be imposed except upon allegation and proof of a prior conviction — that being part of the character of the offence. That statute provided, that “two or more acts of violation of the provisions of this section may be alleged in the same complaint or indictment, and be tried at the same time; and conviction thereon, or on any of them, shall operate upon the defendants in the same manner as if the actions had been upon separate complaints, and the convictions had at separate trials.”

It is said that the *St.* of 1855, c. 215, § 15, which provides that, “when any person is convicted of more than one offence on any such complaint or indictment, he shall be subject to the same punishments as if he had been successively convicted on as many complaints or indictments as there are offences of which he is convicted,” &c., has changed the law, by making a second and third offence liable to an increased punishment, instead of a second and third conviction. Still it must be alleged to be a second or third offence; in order that the proof should follow the allegation, and the judgment follow both. Inasmuch as there is no such allegation in either of these complaints, the judgments are erroneous, and must be reversed.

Judgments reversed, and plaintiff in error sentenced on each complaint as for a first offence.

COMMONWEALTH vs. JEREMIAH LYNCH.

A complaint on the Rev. Sts. c. 50, § 1, for keeping open a shop on the Lord's day for the purpose of doing business therein, is supported by evidence that the owner, his servant or agent, permitted the door to remain unlatched so as to admit persons for the purpose of doing business therein.

COMPLAINT on Rev. Sts. c. 50, § 1, alleging that the defendant, at Boston, on the 16th of September 1855, being the Lord's day, "did keep open his shop, there situate, for a long time, to wit, for the space of one hour, for the purpose of doing labor, business or work therein, namely, selling goods and merchandise therein on said Lord's day, as aforesaid, the same not being works of necessity or charity, against the peace of said commonwealth, and the form of the statute in such case made and provided."

At the trial in the municipal court of Boston at November term 1855, one woman, called as a witness for the Commonwealth, testified that on the day named, between three and four o'clock in the afternoon, she opened from the outside the door of the defendant's shop (which was in his dwelling-house) and, having closed it after she had entered, purchased therein some brandy for three cents, from a person previously shown to have been the agent of the defendant, and, leaving the shop with the brandy so purchased, closed the door after her. One other witness for the Commonwealth testified that in the course of said day he had observed eighteen or twenty persons, at different times, enter said shop by opening and closing the door, in the same manner as testified by the first witness, and depart therefrom; but did not see any sales effected in the shop, nor any evidence that any sales had been made therein, except to the first witness. It did not appear that the door was suffered at any time to remain open, or that the defendant or any person employed by him, opened it at any time during the day.

The defendant contended that the evidence did not sustain the complaint. But *Abbott, J.* instructed the jury "that, in order to constitute the offence charged, it was not necessary to

prove that the door of the defendant's shop was absolutely unlatched, and opened by him or any one in his employment, or that the door was actually kept open during the time charged; but that the offence would be constituted by the defendant, or any person by his direction, for him, on the Lord's day, suffering and permitting the door of the shop to remain unlatched, so as to give free entrance to and departure from the shop, of any designing to enter from without, and so keeping said door unlocked for the purpose of doing business in said shop, other than works of necessity." The jury found the defendant guilty, and he alleged exceptions.

M. O'Connell, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

METCALF, J. A penalty is imposed, by the Rev. Sts. c. 50, § 1, on any person who shall keep open his shop, warehouse or work-house, or shall do any manner of labor, business or work, except only works of necessity and charity, on the Lord's day. The intent of the statute was to prohibit the opening of shops, &c. for the purpose of work or the transaction of business on that day, but not to prohibit the opening of them for any lawful purpose. This is the adjudged construction of the statute. *Commonwealth v. Collins*, 2 Cush. 556. And this complaint alleges, as was held necessary in that case, the unlawful purpose for which the defendant kept open his shop; so that the only question is, whether the evidence showed that he kept it open, within the meaning of the statute. It showed that the shop, on a Lord's day, was open as all shops are, on week days, when the weather is severely cold. And it is not to be doubted that any shop is kept open, on any day of the seven, when it is kept perfectly accessible to those who wish to enter it, and the owner, or his servant or agent, is within, ready to do business.

Exceptions overruled.

COMMONWEALTH *vs.* GEORGE TOLLIVER.

An indictment for an assault in one town is supported by proof of an assault in another town in the same county and within the jurisdiction of the court.

INDICTMENT for an assault upon John Woods, at Boston. At the trial in the municipal court, *Abbott*, J. allowed the county attorney to introduce evidence to prove an assault upon Woods in Chelsea, notwithstanding the defendant's objection that this was a variance. The defendant, being convicted, alleged exceptions.

S. D. Parker, for the defendant, cited *Commonwealth v. Springfield*, 7 Mass. 9; *People v. Slater*, 5 Hill, 401; *United States v. Brown*, 3 McLean, 233; *Rex v. Mellor*, Russ. & Ry. 144; *The Queen v. Martin*, 1 Denison, 398; 1 Chit. Crim. Law, 196.

J. H. Clifford, (Attorney General,) for the Commonwealth.

DEWEY, J. In criminal prosecutions of a character like the present, it is unnecessary to prove the place of committing the offence to be precisely in accordance with the allegation in the indictment. Place is immaterial, unless when it is matter of local description, if the offence be shown to have been committed within the county. All that is necessary to be shown is, that the offence was committed at any place within the county. 2 Hawk. c. 25, § 84. 2 Russell on Crimes, (7th Amer. ed.) 799. 1 Archb. Crim. Pl. (5th Amer. ed.) 99. It was no objection therefore to the competency of the evidence offered, that it tended to prove an assault committed in Chelsea, while the indictment alleged the same to have been committed at Boston, both places being within the county of Suffolk, and equally within the jurisdiction. This rule has been so long recognized and acted upon, that the case presents no new or doubtful question to be solved.

Exceptions overruled.

COMMONWEALTH vs. PATRICK CREED.

An indictment for a felonious assault in one town is supported by proof of such an assault in another town in the same county and within the jurisdiction of the court.

An indictment sufficiently charges a felonious assault with a dangerous weapon, by averring that the defendant, "being armed with a dangerous weapon, to wit, a gun loaded with powder and shot, and capped, in and upon J. S. an assault did make, with the felonious intent the said J. S. with said gun to kill and murder, by feloniously," &c. "discharging said gun at said J. S., and by feloniously," &c. "beating, bruising and wounding the said J. S. with said gun, and thereby giving to said J. S. one mortal wound," &c.; and is supported by evidence of such an assault and attempt by discharging the gun at J. S., or by beating J. S. with the gun.

INDICTMENT on the Rev. Sts. c. 125, § 14. The indictment averred that the defendant on the 5th of July 1856 at Boston, "the said Patrick then and there being armed with a dangerous weapon, to wit, a gun, then and there loaded with powder and leaden shot, and then and there capped, in and upon one Charles Quinn an assault did make, with the felonious intent the said Quinn with said gun to kill and murder, by then and there feloniously, wilfully, and of the malice aforethought, discharging said gun at said Quinn, and by then and there with said gun, maliciously, wilfully and of the malice aforethought of said Creed, beating, bruising and wounding the said Quinn with said gun, and thereby giving to said Quinn one mortal wound, so that the said Quinn should thereof die; and by so doing, and by force of the statute in such case made and provided, he the said Creed is deemed a felonious assaulter; and so" "the said Creed, at said Boston, on the said fifth day of July, with force and arms, feloniously assaulted the said Quinn with said felonious intent, and in manner and form aforesaid; against the peace of said commonwealth, and contrary to the form, force and effect of the statute in such case made and provided."

At the trial in the municipal court of Boston at August term 1856, before *Nash, J.*, the defendant objected to evidence being introduced to prove both modes of attempting to kill, as set forth in the indictment, to wit, discharging the gun at Quinn, and beating, bruising and wounding Quinn with the gun, and requested that the government should be ordered to

elect one of the said two modes of violence upon which they should rely. The evidence on the part of the government tended to show that the defendant snapped the gun at Quinn, exploding the cap, but not discharging the gun, and immediately rushed upon Quinn, holding the gun by the barrel, and beat Quinn upon the head with the butt, thereby breaking the stock in pieces.

The government then offered evidence to prove that the offence was committed in Chelsea, and not in Boston, as alleged. The defendant objected to this evidence as being impertinent and irrelevant to the issue, and as tending to prove a different offence from that set forth in the indictment.

The court overruled these objections, and instructed the jury "that there was no duplicity in the indictment, and that the government might prove the alleged assault and attempt in either or both of the ways set forth — they being parts of one and the same transaction; and that it was not a variance, nor incompetent evidence, if the government proved the offence to have been committed in Chelsea, within said county of Suffolk — the allegation of place being sufficient, if the place proved, though different from that set forth, was within the county and jurisdiction of the court." The jury returned a verdict of guilty, and the defendant alleged exceptions.

The defendant also moved in arrest of judgment in said case for the reasons following:

"First. Because there is no allegation of any assault with the weapon alleged.

"Second. Because there is no allegation that said gun was capable of being discharged.

"Third. Because it does not appear by said indictment that said gun was aimed at the person alleged to have been injured by the defendant.

"Fourth. Because it does not appear that said Quinn was within such a distance of the defendant as to have been possibly injured, in any degree, by the discharge of said gun.

"Fifth. Because said indictment is generally uncertain and void in law."

The court overruled the motion, and to this overruling also the defendant alleged exceptions.

B. J. Gerrish, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

DEWEY, J. The evidence of an assault committed in Chelsea in the county of Suffolk was properly admitted, and is not open to the objection of a variance from the indictment. *Commonwealth v. Tolliver*, ante, 386.

The indictment properly charges the manner in which the assault took place, and that, being armed with a dangerous weapon, the defendant committed an assault with intent to kill and murder. The exception to the ruling of the court, and also the motion of the defendant in arrest of judgment, are

Overruled.

DANIEL CHAMBERLAIN vs. WILLIAM H. CLEMENCE.

A. sold an engine lathe to B., taking back a mortgage thereof which contained a covenant for possession by the mortgagor until breach of condition, and delivered the machine to a carrier, to be taken to the town of B.'s residence; B. on the same day pledged the machine for a valuable consideration to C., and promised to have it sent to him on its arrival; the next morning C. went to the carrier, and directed a teamster to take it home, which he did on the same day; after this order, but before the delivery, A. recorded his mortgage; C. afterwards sold and delivered the machine to another person, and, on A.'s demanding it, answered that he had sold it, and did not know where it was, and refused to assist A. in finding it. *Held*, that there was sufficient evidence of title in A. and conversion by C. to support an action of trover.

ACTION OF TORT for the conversion of an engine lathe. The answer denied both the plaintiff's property and the conversion. Trial in the superior court of Suffolk at November term 1855 before *Nelson*, C. J., who signed this bill of exceptions:

"There was evidence tending to show that the lathe was the property of the plaintiff, and was by him sold on the 14th day of February 1854 to one Waite, who mortgaged the same back to the plaintiff by a chattel mortgage of that date; that in the evening of that day the property was delivered to Waite and

sent to Lowell, where Waite lived, and arrived there early in the morning of the 15th.

" There was also evidence tending to show that Waite, on the evening of the 14th of February, for a valuable consideration, gave a bill of sale as a pledge to the defendant, assuring him that the property was on the cars, would be at the station in the morning, and that he would have it sent to the barn of the defendant; that the defendant, between six and seven o'clock in the morning of the 15th, went to the freight station of the railroad, and saw the property in the cars, and directed a teamster to take it home; and that at some time before noon the lathe was delivered to the defendant's barn. One of the questions submitted to the jury was, whether the defendant obtained actual possession of the pledged property before the recording of the mortgage by the plaintiff.

" The mortgage under which the plaintiff claimed was recorded at nine o'clock on the 15th of February, and contained a covenant for possession by the mortgagor till the breach of condition, which would be on the 18th of June following. On the 2d of June the defendant sold and gave a bill of sale of said lathe, for a valuable consideration, to one Bullens, who took the machine, by the defendant's consent, from the barn of the defendant. On the 18th of June the plaintiff called on the defendant at Lowell, and demanded the machine from the defendant, who made answer that the machine had been sold by him; that he did not know where it was; and that the plaintiff might find it if he could; but that he could not get it or pay for it, save at the end of an execution. There was no evidence that the mortgage was known to the defendant at the time of taking the pledge of the machine.

" On this evidence the defendant asked the court to instruct the jury that, under the circumstances, the demand and refusal were not sufficient evidence of a conversion to support this action. But the court declined to give the instruction prayed for.

" The defendant also asked the court to instruct the jury, that the bill of sale or pledge by Waite to the defendant, if for a

valuable consideration, would, together with the acts proved, if the jury believed the evidence, make a good title against the plaintiff. But the court declined so to instruct the jury.

"The jury found for the plaintiff. To these several rulings the defendant excepts."

B. F. Butler & N. St. J. Green, for the defendant. 1. The defendant's title was perfected before the recording of the plaintiff's mortgage. *Gibson v. Stevens*, 8 How. 384, and cases there cited. *Pratt v. Parkman*, 24 Pick. 42, 47. *Jewett v. Warren*, 12 Mass. 300.

2. The mortgagor, having a right to retain the possession of the chattel, could lawfully pledge it to the defendant; and a sale by the defendant, if made *bona fide* and in ignorance of the plaintiff's mortgage, would not amount to a conversion, but would pass that right of possession and use which the mortgagor had under the covenant of possession.

3. None of the acts of the defendant amount to a conversion. *Vincent v. Cornell*, 13 Pick. 294. *Leonard v. Tidd*, 3 Met. 6. *Strickland v. Barrett*, 20 Pick. 415.

W. Brigham, for the plaintiff.

BY THE COURT. In a case of this nature, where two persons claim personal property under conflicting titles derived from the same vendor, the right depends solely on determining which of the two obtained legal possession of the chattels, or that which in law is equivalent to possession. On the facts proved at the trial, the defendant failed to show any possession, either actual or constructive. That he had not acquired the former is settled by the verdict; nor the latter, because he had done no act which under the circumstances can be regarded in law as equivalent to a delivery or taking possession of the property. It does not appear that there was anything in the nature of the machine to render it inconvenient or impossible for the defendant to have taken it into his immediate actual custody. It was not shown to have been so situated that only a symbolical delivery could be made of it. The defendant did no act prior to the record of the plaintiff's mortgage to perfect his title. He might have removed it from the possession of the carriers, or have obtained

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from them an agreement to hold it for him till he could take it away. He did nothing, but left it in the hands of the carriers, until the plaintiff had completed his title by recording his mortgage in the city of Lowell, where the mortgagor resided.

The evidence of conversion was sufficient. The defendant had constructive notice of the plaintiff's mortgage, and had no right to sell it, and, on demand, to refuse to give such information as would enable the plaintiff to assert his title to it. The demand and refusal were, under the circumstances, ample evidence of conversion.

Exceptions overruled.

SAMUEL H. GIBBENS & another vs. THOMAS CURTIS & others.

A testator devised a house to his only daughter, and directed that it should not be sold during her minority, but the income should be appropriated to her support, and that "the property so bequeathed, namely, said house, together with the residue hereinafter specified, should be received by" a guardian named in the will, "in trust for the uses of" the daughter until her majority or marriage; and "gave and bequeathed" to her "all the rest and residue of his property, of every description;" and directed that the income of the "property bequeathed" to her should be applied to her support until her marriage or majority, "on the occurrence of either of which events, she shall have the full control of her property," and in case of her death before either of those events, "the property bequeathed to her in the foregoing presents shall be divided" into certain pecuniary legacies, and the residue between several charitable societies. *Held*, that the daughter took an estate in fee, by the will, subject to the trust; and that, at her death under age and unmarried, the estate should be sold by the executors for the payment of the pecuniary legacies.

PETITION by the executors of the last will of William E. Priest, for leave to sell, for the payment of legacies, a dwelling-house in Boston, devised by him to his only daughter, who had since died, unmarried and under the age of twenty one years.

The following are the material parts of the will: "After payment of all my just debts and funeral expenses, I hereby give and bequeath the property of which I may die possessed, as follows:

"First. To my only daughter Emma Stanbury Priest, my house, No. 257 Tremont Street; and it is my express desire

that this real estate shall not be sold during the minority of my child, but that the income derived from it shall be appropriated to her support, and for her benefit, as hereinafter provided.

"Second. I give and bequeath to Harriet Louisa Gibbens the sum of ten thousand dollars, for her sole use and benefit; and I hereby appoint the said Harriet Louisa Gibbens sole guardian of my child during her minority; and the property so as aforesaid bequeathed to my said child, namely, the house in Tremont Street, together with the residue hereinafter specified, given to my said child, shall be received and retained by the said Harriet Louisa Gibbens, in trust for the uses of said child, till she attain the age of twenty one years, or shall be married with the consent of said guardian.

"Third. After payment of the two legacies heretofore specified, I give and bequeath the residue of my property, effects and estate, as follows:" [Here follow certain legacies in money.]

"Fourth. I give and bequeath to my daughter, in addition to the legacies before named, all the rest and residue of my property, of every description, of which I may die possessed. And I further will and direct that the income on such property as I have bequeathed to my child, or such portion of it as shall be deemed necessary, shall be applied to the support and maintenance of my child, until she becomes of age or marries with the consent of her guardian, on the occurrence of either of which events she shall have the full control of her property.

"Fifth. In the event of my child's decease, before she becomes of age, or before marriage, I hereby will and ordain that the property bequeathed to her in the foregoing presents shall be divided as follows, to wit": certain sums of money to four relations and friends; and "the residue of said property, after deducting all expenses, shall be equally divided among" four charitable societies named in the will.

C. B. Goodrich, for the petitioners.

S. Bartlett, for the legatees.

F. O. Watts & O. G. Peabody, for the daughter's next of kin.

BY THE COURT. It is quite clear, we think, that the real estate which is the subject of the petition is not left undevise. It is

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given to the daughter of the testator in fee simple, subject to the trust in Miss Gibbens during the minority of the devisee or till her marriage with the consent of her guardian, and liable to be defeated by her death before her majority or marriage.

In the event of the death of the daughter before she becomes of age or is married, "the property bequeathed to her in the foregoing presents" is to be divided in the mode and among the legatees named in the fifth clause of the will. The language is broad enough to include the real estate, and the use of the word "bequeath" in other clauses of the will clearly indicates that such was the intention of the testator.

The legacies to the first four persons named in the fifth clause are cash legacies. They are to be paid by the executors. For the discharge of this trust a sale of the real estate is necessary. The power to make the sale would seem to result from necessary implication. But whether this be so or not, this court, under the Rev. Sts. c. 71, § 20, may authorize or license such sale

Decree for sale as prayed for.

PATRICK H. RODN vs. CYRUS HAPGOOD & another.

The certificate of the clerk of a court of record, that a deposition has been opened and filed by him, is sufficient evidence that it has been duly returned, filed and opened.

ACTION OF TORT for the conversion of a horse to which the plaintiff claimed title under a sale from Patrick F. Clancey Trial in the superior court of Suffolk at January term 1856 before *Nelson*, C. J., who signed this bill of exceptions :

"At the trial, the plaintiff produced from the files of the court, and offered in evidence a deposition of Clancey ; and the defendants objected to said deposition, because it nowhere appeared that the said deposition had been inclosed, sealed up and directed by the justice to the court before whom the cause was pending, and remained sealed up until opened in court by

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the court. The court, finding the indorsement of the clerk that said deposition had been opened and filed by the clerk, and no other objection save the above named being made, and the defendant furnishing no evidence upon the subject matter, overruled the objection and allowed the deposition to be read. The jury returned a verdict for the plaintiff, and the defendants except."

P. Willard, for the defendants. The deposition of Clancey was improperly admitted, because it nowhere appeared that all the statute provisions had been complied with; and the burden of proof is upon the party offering a deposition to show a strict compliance with the statutes. Rev. Sts. c. 94, § 24. *Beale v. Thompson*, 8 Cranch, 70. 1 Greenl. Ev. §§ 322, 323 & notes.

B. Dean, for the plaintiff.

BY THE COURT. The certificate of the clerk that the deposition had been opened and filed by him is *prima facie* evidence that it was duly sealed up and directed in conformity with the requisitions of the statute. If there had been any irregularity in this particular, the presumption is that the clerk would have noticed it, and have preserved the envelop or return of the magistrate, so that either party might bring the question before the court.

Exceptions overruled.

PATRICK GANNON vs. CHARLES J. ADAMS.

A common seller of intoxicating liquors, sentenced to imprisonment and payment of fine and costs under St. 1856, c. 215, § 17, is not entitled to be discharged as a poor convict under the Rev. Sts. c. 145, § 8, until after three months from the expiration of the time for which he was sentenced to be imprisoned.

PETITION for a writ of *habeas corpus* presented on the 2d of March 1857, by one imprisoned in the house of correction, (of which the respondent was master,) under a mittimus issued by the court of common pleas in Middlesex on the 15th of November 1856, after the petitioner had been convicted in that court of

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being a common seller of intoxicating liquors, and sentenced to pay a fine of fifty dollars and costs of prosecution, and be imprisoned in the house of correction three months, and stand committed in pursuance of said sentence.

The case was heard before a single judge, and by him reserved for the consideration of the full court, to whom it was submitted without argument.

THE COURT held, that as the Rev. Sts. c. 145, § 3, applied to cases of poor convicts who "shall have been confined in prison for a space of three months for fine and costs only," said space of three months must be computed from the expiration of the time for which the petitioner was sentenced to be imprisoned, pursuant to *St. 1855, c. 215, § 17*; for until the expiration of that time he could not be said to be imprisoned "for fine and costs only," within the meaning of Rev. Sts. c. 145, § 3.

Petition dismissed.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT

FOR THE
COUNTY OF BERKSHIRE, AT LENOX,
SEPTEMBER TERM 1857.

PRESENT :

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY,
HON. THERON METCALF,
HON. GEORGE T. BIGELOW, } JUSTICES.
HON. BENJAMIN F. THOMAS, }

LEVI B. WARNER vs. SAMUEL BACON.
SAME vs. SAME.

In an action for the breach of an agreement to convey real estate, special damages, not implied by law as the necessary consequences of the breach, cannot be recovered unless alleged in the declaration.

Additional damages occasioned by the continued withholding of real estate, after the bringing of an action for the breach of an agreement to convey it, cannot be given in evidence in that action; but may be recovered in a subsequent action.

In an action for the nonperformance of an agreement to convey real estate, the plaintiff cannot recover expenses incurred by him in erecting a building on his other land, by reason of not obtaining a legal right to put thereon a similar building standing upon the land agreed to be conveyed.

Under an agreement for an exchange of lands, one party executed his conveyance, and the other refused then, but subsequently executed his conveyance also, which was

Warner v. Bacon.

accepted. *Held*, that such acceptance was a bar to any action by the first grantor for the rent of the land granted by him between the times of the two conveyances. In an action for nonperformance of an agreement to convey land, brought after a conveyance thereof has been made and accepted, evidence that the defendant was induced to make the agreement by false and fraudulent representations of the plaintiff as to the value, condition and incumbrances of land which the plaintiff on his part conveyed to the defendant, by reason of which the defendant was obliged to spend a large sum of money thereon, is inadmissible, either by way of bar, set-off or recoupment.

TWO ACTIONS OF CONTRACT upon one agreement in writing, dated December 8th 1854, between Samuel Bacon of Binghampston, N. Y., and Levi B. Warner of Brooklyn, N. Y., for the sale by Bacon to Warner of land in Egremont, with a dwelling-house and barn thereon, and including a wood lot, for the price of \$3500, for \$2000 of which Bacon should receive a house and lot in Brooklyn, N. Y., and the residue in certain stock and a note for \$500; the respective deeds to be made and delivered by the 20th of January 1855.

In December 1854 Warner performed his part of the agreement, and Bacon accepted the deed and stock, or retained them in his possession; but refused and neglected to make or deliver a deed of his land in Egremont to Warner.

On the 28th of January 1855 Warner brought the *first* action upon the agreement, alleging performance of his part thereof and Bacon's neglect and refusal to deliver to him a deed of the land in Egremont, but not alleging any special damage; and attached property of the defendant, and entered his action at February term 1855 of the court of common pleas, when an order of notice was issued, returnable at June term 1855.

On the 11th of May 1855 the defendant executed the deed of the Egremont property, and tendered it to the plaintiff, who accepted it and took possession of the property.

At June term 1855 the defendant appeared, and the action was continued; and at the next term the defendant filed an answer, denying the agreement and the plaintiff's performance. At June term 1856 the defendant, by leave of court, filed a supplemental answer, alleging the defendant's tender and the plaintiff's acceptance of the deed of the Egremont property, and the plaintiff's subsequent possession under it; and a trial was had

before *Briggs, J.*, who signed a bill of exceptions, the material part of which, after reciting the facts above stated, was thus :

“ The plaintiff contended that he was entitled to recover from the defendant all such damages as he had actually sustained by the breach of the contract by the defendant ; that, in the absence of the plea of the tender of the deed in May 1856, he would have been entitled to recover the consideration money of \$3500, and interest ; that upon the filing of such plea or supplemental answer, it should only avail the defendant in mitigation of damages ; and that the plaintiff was, in addition to the damages sustained by him between the 20th of January 1855 and the date of his writ, entitled to recover from the defendant all damages between the date of the writ and the 11th of May, when the tender was made.

“ The plaintiff had taken possession of a wood lot upon the Egremont premises, and had a lease of the barn to April 1st ; and by the understanding of the parties, which was not controverted, the dwelling-house was to be subject to a lease to the former tenant, which expired on April 1st. The plaintiff testified that he was in possession of the Egremont property, to the same extent as if the deed to him had been delivered at the time specified in the contract. Although the plaintiff had possession of the premises to be conveyed to him, he was, as he claimed, deprived of the use and control of the same, as tenant of the fee, for the removal of the barn, &c.

“ The plaintiff offered evidence to prove, as matter of damages, 1st. That the defendant forbid his having anything done to or with the Egremont property, and refused to allow him to remove a barn from said property to other land of the plaintiff. 2d. That the plaintiff, about the first of April 1855, made excavations and got out stone to build a barn on his other land. 3d. That the defendant received rent on the Brooklyn property before the 1st of April. 4th. That rent was received by the defendant, subsequent to the 1st of April, on the Egremont property

“ The court ruled that the plaintiff, upon the breach of the contract by the defendant, was entitled to recover in this action for all the injury and damages which he had sustained as the

natural and necessary consequence of the nonperformance of the contract on the part of the defendant; that he was to be limited to such damages as he had sustained up to the date of his writ; and rejected evidence of any of the items of damage specifically set forth by the plaintiff.

"The jury returned a verdict for the plaintiff, and assessed damages at the sum of \$16. To the above rulings the plaintiff excepts." This case was argued and decided at September term 1856.

C. N. Emerson, for the plaintiff, cited 2 Greenl. Ev. § 268; Sedgwick on Damages, (2d ed.) 106 & seq. & cases cited; *Wilcox v. Plummer*, 4 Pet. 182; Com. Dig. Damages, D.; *Greenfield Bank v. Leavitt*, 17 Pick. 3; *Fox v. Harding*, 7 Cush. 522; *Leffingwell v. Elliott*, 10 Pick. 204; *Brooks v. Moody*, 20 Pick. 474; 2 Parsons on Con. 472, 473, 506; U. S. Dig. Suppt. Damages, pl. 250, 253; *Merrill v. How*, 24 Maine, 126.

J. Price, for the defendant.

METCALF, J. The judge rightly excluded evidence of the four matters of damage which the plaintiff offered to prove. Without inquiring whether they would, under any form of declaration, have been legal grounds of damage, it is sufficient for the decision of this case, that they were not the necessary consequences of the defendant's breach of agreement, which are implied by law; and were not alleged in the declaration. Nor were they consequences which (in the language sometimes used by judges) "in all probability" might follow, or would be "very likely to follow," from that breach. See *Richardson v. Mellish*, 2 Bing. 239; *Goslin v. Corry*, 7 Man. & Gr. 346; *Ferrer v. Beale*, 1 Ld. Raym. 692; 1 Chit. Pl. (6th Amer. ed.) 370, 441; 2 Greenl. Ev. § 254. "Mere collateral damage," says Holroyd, J., "must be stated in the declaration, in order to entitle the plaintiff to give it in evidence, lest otherwise the defendant might be taken by surprise." *Battley v. Faulkner*, 3 B. & Ald. 294. And this rule of the common law is not changed by the practice act of 1852, c. 312. *Baldwin v. Western Railroad*, 4 Gray, 336.

The judge also ruled, that the plaintiff "was to be limited to such damages as he had sustained up to the date of his writ." And this is the general rule of law. *Pilfold's case*, 10 Co. 117. Com. Dig. Damages, D. *Pierce v. Woodward*, 6 Pick. 206. There are, however, exceptions to the rule. And the question now is, whether the damage sustained by the plaintiff, after the date of his writ, from the defendant's omission to convey to him the Egremont estate, is within the rule, or is an exception to it. There is a compilation of most of the decisions on this subject in Sedgwick on Damages, c. 3, and Mayne on Damages, 33-38. In the latter book it is said, that "damages arising subsequent to action brought, or even to the date of verdict, may be taken into consideration, when they are the natural and necessary result of the act complained of, and where they do not themselves constitute a new cause of action." "On the other hand, where the damages subsequent to the commencement of the action are not the necessary result of the alleged wrong, or where they might be the foundation of a fresh action, they cannot be included in the verdict of the jury." The application of these rules to particular cases, like the application of other rules of law, which seem very plain, is often very difficult. We find no adjudged case which, if we were to regard it as a binding authority, would be decisive of the case at bar.

Our judgment is, that the continued withholding of a conveyance of the Egremont estate, after the 28th of January (the date of the writ) till the 11th of May, when the conveyance was made, is not a damage recoverable in this action. We think the case is more analogous to those in which damage sustained after action brought has been held not to be recoverable, than to those in which it has been held that it may be recovered.

In *Hambleton v. Veere*, 2 Saund. 169, the declaration was for the defendant's procuring the plaintiff's apprentice to depart from his service, and for loss of that service for the residue (four years) of the term of apprenticeship. Judgment was arrested, because the jury assessed damages generally, as declared for; the court saying the plaintiff "ought to have recovered damages for the loss of service until the exhibiting of the bill only, and

no more." See other like cases in the notes, by Williams and others, to the principal case, and also the opinion of Battle, J., in *Moore v. Love*, 3 Jones N. C. 215. In *Powers v. Ware*, 4 Pick. 106, which was an action of covenant on an indenture of apprenticeship, brought before the expiration of the apprenticeship, for not maintaining the apprentice, it was decided that damages could be recovered only to the date of the writ. The reason given was, "for aught we know, the defendant may be ready to perform his covenant in future." And it was said by Litledale, J., that, "in the case in Saunders, the future damage could not be assessed, inasmuch as the apprentice might return." *Hodsoll v. Stallebrass*, 3 P. & Dav. 203. These reasons seem as applicable to this case as to those.

The same rule of damages is applied to actions for an obstruction, which may be temporary, of a stream of water, of a way, or of light and air. *Duncan v. Markley*, Harper, 276. *Cole v. Sprowl*, 35 Maine, 161. *Blunt v. McCormick*, 3 Denio, 283. But if the obstruction be permanent, so that the plaintiff can no more have the flow of a stream, or the enjoyment of a way, or light or air, then all the damages which he sustains from the destruction of his rights are recoverable. *Troy v. Cheshire Railroad*, 3 Foster, 83. And if this defendant had conveyed the estate to a third person, before this action was brought, and thus made himself unable to convey it afterwards, the plaintiff would have been entitled to all the damages sustained by the loss of the estate. But the facts of the case show only a temporary withholding of the plaintiff's rights, for which, as in the cases above cited, damages have been held recoverable only to the time of action commenced.

It might have been wise in the defendant, if he had not objected to the recovery of damage sustained by the plaintiff between the date of his writ and the day when the conveyance was made. In *Goslin v. Corry*, 7 Man. & Gr. 345, where a defendant, on the trial of an action for a libel, permitted evidence to be given of damage caused after action brought, Tindal, C. J. said: "By permitting this evidence to be given, the defendant may possibly have escaped a second action brought

against him. It was therefore far from an impolitic thing to allow damages to be assessed for the whole cause of complaint in one action.”

Exceptions overruled.

The plaintiff then brought a *second* action in the court of common pleas, on the same agreement, to recover the special damages which accrued to him between the date of the first writ and the 11th of May 1855, and set forth the same breach, but alleged specially in his declaration the four items of damage which he attempted to prove at the first trial.

The defendant in his answer alleged, 1st. The former judgment; 2d. Performance of the agreement by the defendant, and nonperformance by the plaintiff; 3d. That the defendant was induced to make the agreement by false and fraudulent representations of the plaintiff as to the value, condition and incumbrances of the estate in Brooklyn, by reason of which the defendant had been obliged to spend \$500 thereon; 4th. A denial of the alleged items of damage.

The parties submitted the case to the court of common pleas, and, on appeal, to this court, upon the facts stated in the above report of the first trial; admitting, “for the purpose of the hearing upon this statement of facts, that the plaintiff suffered some injury by the defendant’s said breach of the contract, which was not recovered and was not admitted to be proved in the first action;” and agreeing “that if the foregoing facts constitute a defence to this action, the plaintiff shall become nonsuit; otherwise, the case shall stand for trial upon the questions presented by the other issues made by the declaration and answer.”

This case was argued at this term by the same counsel, and the decision was made in June 1858.

METCALF, J. If the damages now sued for could have been recovered in the former action, they cannot be recovered in this. But it does not follow, as of course, that they can be recovered now because they were not allowed to be recovered then. A plaintiff may fail to recover all the damages he is entitled to, by not so framing his declaration as to cover them all, or by not so managing his case as to bring the full damages to the consid-

eration of the court or the jury. What he thus loses is lost by his own fault. Or a plaintiff may, by the erroneous exclusion of evidence, be deprived of a part of his legal damages. What he thus loses is lost by the error of the court; yet his remedy is not a new action for the recovery of what he was not before permitted to recover, but a new trial of the first action on a setting aside of the verdict for such wrong exclusion of evidence. This plaintiff first attempted that course; and if the evidence had not been rightly excluded in the former case, a new trial would have been ordered.

The damages now demanded are those only which the plaintiff sustained, if at all, after the commencement of the former action. For all previous damages he has recovered, or might have recovered, in that action, his full legal recompense.

The declaration in this case sets forth four grounds of damage. First, the plaintiff's deprivation, after the first action was brought and until the Egremont estate was conveyed to him, of the benefit and advantage which he would have enjoyed from the full title to it during that interval. Second, the expenses incurred by him in preparing to build a barn on his other land, by reason of his not obtaining a legal right to place thereon a barn that was on the land which the defendant had agreed to convey to him. Third, his loss of the use, improvement and income of the estate in Brooklyn which he conveyed to the defendant. Fourth, the loss of the rents of the estate that was to be conveyed to him; the defendant having collected them.

The second and third grounds of the plaintiff's claim are easily disposed of. He has no legal cause of action for either; and would not have been entitled to damages for the second, even if the defendant had never conveyed the estate to him. That ground of damage is too remote; not being a proximate consequence of the defendant's breach of agreement. *Sibley v. Hoar*, 4 Gray, 222. *Blood v. Nashua & Lowell Railroad*, 2 Gray, 137. *Waite v. Gilbert*, 10 Cush. 177. 2 Greenl. Ev. § 256. The third ground is to be regarded precisely as if the plaintiff had paid money as the consideration for the stipulated

conveyance, instead of transferring property as the consideration therefor, and as if he were now seeking, as damages, the loss of the use of the money up to the day when the conveyance was made to him and accepted by him. If that conveyance had not been made and accepted, the plaintiff would have been entitled, in the former action, to recover the amount of the consideration which he had advanced, and interest thereon, if it had been money, or an equivalent for interest, as the facts were. But the claim to recover back the consideration was extinguished by the acceptance of the conveyance after action brought; and the principal being in effect paid, no legal claim to the interest, or to its equivalent, longer exists. *Gage v. Gannett*, 11 Mass. 217. *Dixon v. Parkes*, 1 Esp. R. 110. *Tillotson v. Preston*, 3 Johns. 229.

The question on the first and fourth grounds of the plaintiff's present claim is, whether they constitute a new cause of action, or are only new damages resulting from the original cause of action. A fresh action cannot be brought unless there be both a new unlawful act and fresh damage. *Howell v. Young*, 5 B. & C. 267. *Hodsoll v. Stallebrass*, 11 Ad. & El. 306, and 3 P. & Dav. 203. *Whitney v. Clarendon*, 18 Verm. 258. The application of this doctrine is not always easy, and perhaps has not always been rightly or consistently made.

In actions for injury to the person of the plaintiff or his servant, by battery, or by accident on a highway or railroad, &c., it is the settled law that damages may be given for all that the plaintiff may suffer in future from the injury. The jury are to estimate, as well as they may from the evidence before them, all the loss and damage which the plaintiff has sustained or will sustain. And when damages have been once recovered, no new action can be maintained for sufferings afterwards endured from the unforeseen effect of the original injury. *Fetter v. Beal*, 1 Ld. Raym. 339, 692, 12 Mod. 542, and 1 Salk. 11. *Black v. Carrollton Railroad*, 10 Louis. Ann. R. 33. *Curtiss v. Rochester & Syracuse Railroad*, 20 Barb. 282. 11 Ad. & El. *ubi sup.* And, as was stated in the opinion in the former case, the law is the same when one is deprived of the enjoyment of a right to

the flow of a stream of water, &c., by a permanent obstruction. But we suppose the law to be different in that class of cases to which we then deemed and now deem this to be more analogous. Plain justice requires that a plaintiff should have a remedy for all the legal damage he sustains from a tort or breach of contract; and that if, by reason of some rule of law, and without any fault or mistake of his, he can recover only part of that damage in one action, he should be entitled to recover the rest in another. But, as special damage—that is, damage which is not the necessary consequence of the wrong complained of—cannot be recovered unless it is alleged in the declaration, it follows that such damage, sustained after an action has been brought, cannot be recovered at all, unless in a new action; inasmuch as it cannot be alleged and proved before it exists. And in cases of nuisance, where damages after action brought are held not to be recoverable, it is also held that a new action may be maintained for a subsequent continuance of the nuisance; every continuance thereof being a new injury, and not merely a new damage. 12 Mod. 544. Com. Dig. Action upon the Case for a Nuisance, B. See also *Holmes v. Wilson*, 10 Ad. & El. 503. So where damages only to the time of action brought are allowed to be recovered for the enticing away and detention of apprentices, or for not maintaining them according to contract, we hold that, for a subsequent detention or refusal to maintain, during the continuance of the apprenticeship, a new action may be supported. In *Horn v. Chandler*, 1 Mod. 271, the action was against an apprentice who had bound himself to the plaintiff for seven years; and the declaration alleged that the defendant went away from the plaintiff's service, "*per quod* he lost his service for the said term, which term is not yet expired." On demurrer, it was held that though declaring for the loss of the unexpired term was "naught after verdict," yet, upon demurrer, the plaintiff might take damages for the departure only, and not for the loss of service during the term. Speaking of that case, Littledale, J. said: "There a fresh cause of action arose every day." 11 Ad. & El. 304. The same is equally true of the actions above mentioned, for entic

ing away and detaining apprentices, or for refusing to maintain them. And certainly a new action may be maintained whenever there is a new cause of action. In 3 Foster, 102, Bell, J., in a very able opinion, says, that if damages "result, not from the wrongful acts, but from the wrongful continuance of the state of fact produced by those acts, they form the basis of a new action."

On these grounds and authorities, we are of opinion that the continued omission of the defendant, after the former action was commenced, to make a conveyance to the plaintiff, was a new cause of action, and not merely a new damage. If it were a new damage merely, that damage should have been allowed to be recovered in the former suit.

The agreement on which this action is brought was never rescinded. It has been hitherto treated by both parties as an open and continuing agreement. If it had been rescinded, the plaintiff must have sought his remedy, not by an action for the breach of it, but by some different action. See *Canada v. Canada*, 6 Cush. 17; *Goodman v. Pocock*, 15 Ad. & El. N. R. 576; *Hochster v. De La Tour*, 2 El. & Bl. 678.

The case of *Clossman v. Lacoste & another*, 28 Eng. Law & Eq. 140, strongly resembles this. There the plaintiff had agreed to serve the defendants for five years, and they had agreed to guaranty to him a certain sum yearly during the continuance of the agreement. After the five years had expired, the plaintiff brought an action on the agreement, alleging that the defendants had not guarantied nor paid the stipulated sum for his services during the fourth and fifth years. The defendants pleaded in bar a former recovery by the plaintiff in the court of exchequer, for their default in not paying him for his services during the first and second years, and for dispensing with his services during the whole of the third year. "This plea," said Lord Campbell, "is bad, unless the cause of action in the present case is the same as that in the action in the court of exchequer, and the damages recoverable now could have been recovered in that action. I am of opinion that these damages could not have been recovered in that action, and that the dam-

ages in that action could not be assessed beyond the third year. For anything that appears in that action, the relation of employer and employed still continued between these parties. The claim now being for damages in the fourth and fifth years, why should there not be a second action?" "If the contract is entirely broken, and the relation of employer and employed put an end to, I agree that the party suing ought to allege in his declaration the whole gravamen that he suffers by such breach of contract; and that he may recover therein all the damages that may ensue to him in consequence. But there is nothing to show such a state of facts in the present case; and I am of opinion that the present is a new cause of action."

The result in the present case is, that the plaintiff is entitled to recover the legal damage sustained by him between the time when the former action was commenced and the time when the conveyance of the estate was made to him, by reason of his not having, during that interval, a full title to that estate. As he was in possession, that damage cannot be great.

He may also recover the amount of the rent which he would have been entitled to if the estate had been conveyed to him at the stipulated time, namely, the rent which was accruing at that time, and which the defendant received during the aforesaid interval. *Stone v. Knight*, 23 Pick. 97. *Burden v. Thayer*, 3 Met. 76. Taking what appears in the declaration in this case, in connection with what appeared in the former action, our inference is, that a portion of the estate was under lease to a tenant, when the agreement in suit was made, and that the defendant, before conveying the reversion to the plaintiff, collected the rent reserved in that lease. This will be matter of evidence hereafter.

Unless these two matters of damage are adjusted by the parties, the case is to go to a jury. But the matter of the plaintiff's misrepresentation and fraud, set out in the defendant's answer, cannot be shown on the trial of this action, either by way of bar, set-off or recoupment.

NATHAN BENJAMIN vs. THOMPSON C. WHEELER.

An action for injuries occasioned to land of an abutter by acts done by direction of a surveyor of highways in digging a watercourse in a highway with the approbation of the selectmen cannot be supported by evidence that the surveyor acted wantonly and with the intention of injuring the plaintiff, or that the acts done were not necessary to the repair of the way.

In an action for an injury occasioned by digging a watercourse in a highway under the direction of the surveyors of highways, one of the surveyors, being called as a witness for the defendant, denied, on cross-examination, that he ever stated that this work was done as he had directed. *Held*, that the plaintiff might introduce evidence to contradict him on this point.

ACTION OF TORT for digging a watercourse in a highway in Egremont in front of the plaintiff's premises in 1854, so as to incommode him in passing to and from his dwelling-house and barn. The defendant justified the alleged trespass on the ground that he was acting by the direction of the surveyors of highways of the town for the year 1854, in repairing said highway, and did no more than the public convenience and necessity required, and that all his acts in the premises were approved by said surveyors. Trial in the court of common pleas, at October term 1856, before *Briggs, J.*, who signed this bill of exceptions:

"The plaintiff introduced evidence of the alleged trespass, and of the damage to the plaintiff, and rested his case.

"The defendant, at the suggestion of the court, then introduced his evidence, confining it to proof of the authority given him and the appointment of the said surveyors. It appeared from the records of the town that for the year 1854 three selectmen were chosen, and were subsequently elected surveyors of highways at large for the same year. And the defendant's evidence tended to show that the three surveyors all authorized and approved the acts of the defendant.

"Upon the introduction of the defendant's evidence on these points, the court proposed to instruct the jury that, if they believed that the defendant, in repairing this road and making the ditch, acted under the direction of the selectmen, acting as

surveyors of highways, the plaintiff could not maintain this action.

"The plaintiff then proposed to offer evidence to prove that, in making the ditch in question, all the parties connected with it, especially the defendant, acted wantonly and for the purpose of injuring the plaintiff, and that the acts done were not necessary to be done to repair the road as required by law. The defendant objected to this evidence. His objection was overruled, and, for the purposes of this trial, the evidence admitted.

"The defendant then introduced the three selectmen who acted as surveyors, whose testimony tended to prove that the repairs done upon the road, and which were complained of by the plaintiff, were done under their authority and direction, and that the same were approved by them, and that what was done was necessary and proper for the repairing of the road.

"One of the defendant's witnesses, who was also one of the surveyors, on cross-examination by the plaintiff, denied that he had ever stated to other persons, upon other occasions, since the work was done, that he had not directed the work to be done in the manner it was done. The plaintiff afterwards offered to prove, by another witness, that said surveyor had at other times said and stated that he had not directed said work to be done as it was done. The defendant objected to this evidence; but his objection was overruled, and the evidence was admitted.

"The defendant offered to prove the nature of repairs on other parts of the road, for the purpose of showing that no more was done in front of the plaintiff's premises than was done elsewhere; it having been testified by one of said surveyors that he instructed the defendant to plough and scrape in front of the plaintiff's premises, as he did in other parts of the road. The plaintiff objected to this evidence, and the court excluded it.

"In the course of the trial, the plaintiff offered evidence of the condition of the highway as to repairs at another place on the road, where repairs were also made by the defendant to some extent, at or about the time of the alleged trespass, for the

Benjamin v. Wheeler.

purpose of showing that no ditches were there made by the side of the road. The defendant objected, but the court admitted the evidence.

"Upon the whole evidence, the court gave the following instructions to the jury: If the jury are satisfied that the selectmen of Egremont, acting as surveyors of highways, in good faith employed and directed the defendant to repair the road adjoining the plaintiff's land, and the defendant, in pursuance of that employment and direction, did the work and made the repairs on that part of the highway, as directed by the surveyors, and they approved of what he had done, the plaintiff, though he may have been injured and aggrieved by what the defendant so did, under the direction of the surveyors, cannot maintain this action; but his only remedy is under the statutes of the Commonwealth. But if, in making the ditch complained of by the plaintiff, all the parties connected with it, especially the defendant, acted wantonly, for the purpose of injuring the plaintiff, and the acts done were not necessary to be done to repair the road as required by law, the defendant is responsible to the plaintiff in this action for damages. If the defendant, in making the repairs on the road against the plaintiff's land, designedly exceeded his authority, for the purpose of wantonly injuring the plaintiff, he is liable in this action for any damages done by that excess. If the surveyors acted in good faith in giving directions to the defendant, and he followed and complied with those directions, and the plaintiff was injured by the work, though, in doing the work, the defendant might have been actuated by ill will towards the plaintiff, he would not be liable for damages in this action. To these rulings and instructions the defendant excepts."

J. Rockwell & J. Price, for the defendant.

I. Sumner & J. E. Field, for the plaintiff. 1. The defendant's acts were without lawful authority. The selectmen could not be surveyors of highways, because the duties imposed upon those officers respectively are incompatible. Rev. Sts. c. 25, §§ 5, 7, 14, 19. Bac. Ab. Offices & Officers, K. *Vanderheyden v. Young*, 11 Johns. 150.

Benjamin v. Wheeler.

2. But if the defendant acted under authority conferred, and abused it, (as the verdict finds he did,) he is liable. *Malcom v. Spoor*, 12 Met. 279. *Melville v. Brown*, 15 Mass. 82. *Rowley v. Rice*, 11 Met. 337. *Mussey v. Cahoon*, 34 Maine, 74. *Bradley v. Davis*, 14 Maine, 44.

3. The evidence contradicting the testimony of the alleged surveyor was competent. His testimony was to a material fact, variant from his statements in the country. *Ware v. Ware*, 8 Greenl. 42.

4. The defendant's offer to show the character of repairs elsewhere than at the place complained of was of a collateral and immaterial matter, and incompetent. *Commonwealth v. Vaughan*, 9 Cush. 595.

5. It was competent for the plaintiff to show any specific act of the defendant, in connection with the act complained of, which had a tendency to show wrongful intent. *Wood v. United States*, 16 Pet. 342.

THOMAS, J. This is an action of tort, for digging a ditch or watercourse in the highway in front of the dwelling-house and barn of the plaintiff, thereby rendering them more difficult of access. The defendant answered that, in making the watercourse, he was acting under the direction of the surveyors of highways in repairing the way, and that all acts done by him were done with their authority and approval.

The selectmen of Egremont for the year 1854 were also elected surveyors.

The plaintiff offered evidence of the doing of the acts alleged; and the defendant, that in so doing he had the direction and approbation of the surveyors.

1. The plaintiff then offered evidence to show that, in making the ditch, the surveyors and the defendant, and especially the latter, acted wantonly and for the purpose of injuring the plaintiff, and that the acts done were not necessary for the repair of the way, as required by law. To the admission of this evidence the defendant objected; but the court, for the purposes of the trial, admitted it. To this admission of evidence the first of the defendant's exceptions was taken. We think the evidence should have been excluded.

The question of the necessity of the repairs must be determined by the proper officers of the town, and their judgment and action upon the subject cannot be revised by the jury in an action at law. If the construction of the watercourse was with the approbation of the selectmen, legally given, it cannot be left to the jury to say whether the making of such watercourse was necessary for the highway.

Nor was it competent to show that the thing done was done for the purpose of injuring the plaintiff. An act done within the scope of the officer's authority does not become illegal by reason of the motive which may have influenced his mind in doing it. To the extent to which the estate of the plaintiff is injured by any act done in the repair of the way he has a full compensation in damages. Rev. Sts. c. 25, § 6. And the motives with which the act is done by the surveyor or the selectmen do not change the character of the watercourse, or make it of more or less injury to the estate.

2. The defendant relying upon the testimony of the selectmen, who acted also as surveyors, to show that the work was done under their authority and in the manner directed by them, it was certainly competent for the plaintiff to prove that one of the witnesses so testifying at the trial had, on other occasions, said that he had not directed the work to be done as it was done. It was the common mode of impairing the weight of a witness's testimony by showing he had made in the country statements conflicting with those made upon the stand.

The cross-examination of the witness was not, under our practice, necessary to the introduction of testimony of conflicting statements made elsewhere by the witness, nor did the cross-examination affect the right of so doing. The subject-matter was not collateral, but obviously material to the issue.

3. The evidence as to the repairs made in other parts of the highway should have been excluded, for the reason before stated, that the necessity or propriety of the repairs, if made by the proper officers of the town, and within the scope of their authority, were not to be revised by the jury. It is difficult to

see any posture of the cause in which such evidence would be material.

4. The opinion expressed as to the evidence admitted in the cause indicates the exception to which, we think, the final rulings of the presiding judge are justly liable. The true inquiry was, whether the defendant had legal authority to do what he did in the highway. If he had such authority, and acted within the scope of it, he is not a trespasser because his motives or purposes with respect to the plaintiff were unkind or malicious. For an act lawfully done in the repair of the highway, the statute has given the plaintiff a remedy, and that a sole and exclusive one. If the defendant exceeded his authority, he may be liable in tort; but upon the bill of exceptions we do not see that this question was raised.

A point was made at the argument, which does not appear to have been made at the trial, to wit, that the acts of the defendant were without authority because, conceding that he acted under the direction of the selectmen who had been chosen surveyors, the selectmen could not have been legally chosen the surveyors of highways, the offices being incompatible. Rev. Sts. c. 25, §§ 5, 7, 14, 19. Another suggestion may be of moment; it is, that the case does not disclose that the approbation of the selectmen was first obtained in writing. Rev. Sts. c. 25, § 5. These may present important questions upon any future trial; but we do not feel called upon to decide them in the present posture of the cause.

Exceptions sustained.

ROBERT KILBORN vs. ZADOC REWEE.

Evidence of frequently cutting wood and timber on a tract of woodland for more than twenty years, under a claim of title, will support an action of trespass against one who shows no title.

There is no presumption in favor of a meeting of a proprietary, held only twelve years since, on the warrant of a justice of the peace, on the application of five persons describing themselves as proprietors, that they were in fact proprietors.

A title acquired since the commencement of an action of trespass *quare clausum* is no justification of the trespass.

ACTION OF TORT, commenced on the 4th of January 1854, for breaking and entering the plaintiff's close in Great Barrington, and cutting and taking away wood and timber. Answer, soil and freehold in the defendant. Trial and verdict for the plaintiff in the court of common pleas at October term 1856, before *Briggs, J.*, who signed a bill of exceptions, the material parts of which were as follows :

"The alleged acts of trespass were proved, and the only question was in relation to the title to the premises. The plaintiff set up title in himself, first, by means of long continued acts of occupation and possession of the land ; and secondly, through a location or pitch under the Housatonic Lower Proprietary.

"To establish his right or title of possession, the plaintiff introduced a number of witnesses," who testified that the plaintiff, in 1825, cut upon the premises (which were a tract of mountain woodland) timber for the frame of a dwelling-house ; and before and after that time cut logs there for a saw mill which he owned ; and at different times, from 1825 to 1852, cut considerable quantities of firewood and timber on various parts of the premises, for his own use and for sale ; and claimed title to the premises, and permitted other persons to cut there, and forbade others to cut without his permission.

"Upon this evidence the plaintiff claimed to recover ; but the defendant claimed that the plaintiff had failed to establish a title from acts of occupation and possession, and that the jury should be instructed that the acts proved did not amount to a legal possession of the premises. But the court declined so to

instruct the jury, and left it to them as a question of fact upon the evidence offered; to which ruling the defendant excepted.

"The plaintiff also offered in evidence a paper which he claimed was a survey or location of land under the proprietary, made in 1819, and two deeds made to him in 1815, of rights to lay certain numbers of acres in said proprietary." There was conflicting evidence upon the question whether the premises were included in this location, which was submitted to the jury with an instruction that the forms of proceeding were legal. To this instruction also the defendant excepted. But a more particular statement of this part of the case is not necessary to the understanding of the decision of this court.

"The defendant claimed title to the premises under Shaler Trowbridge. Said Trowbridge testified that he was a grandson of Sarah Marvin, whose father was a brother of James Smith or James Smith, Jr., an original proprietor. It appeared however that the father of said Shaler, son of said Sarah, and who died in her lifetime, was illegitimate.

"The defendant also introduced a deed from Jedediah Burrill to said Shaler, dated April 16th 1845, purporting to convey certain rights to locate; also deeds from Lydia Trowbridge, widow and devisee of said Shaler's brother, and Mary Trowbridge, sister of said Shaler, dated April 4th 1845, purporting to convey rights derived by inheritance from said James, through said father of said Shaler; also deeds (predicated upon said Shaler's location hereafter named) from said Shaler to George Pyncheon, from said Shaler to Jarvis Pixley, and from said Pixley and Shaler to the defendant.

"The defendant also offered to show that a location was made by said Shaler on the 23d of March 1845, including the premises; and claimed that the same was recorded in the records of the proprietary. There were no meetings of the proprietary between 1790 and 1842. In 1842 five persons, (of whom said Shaler was one,) describing themselves as proprietors, signed a petition to a justice of the peace, to call a meeting of the proprietary for reorganization; a meeting was called accordingly, and the proceedings and records in pursuance thereof the de-

fendant offered to show in evidence. The plaintiff objected that at the decease of the clerk in 1835 all the offices of the proprietary became vacant, (which was not disputed,) and that no reorganization was legally effected in 1842, nor since the death of said clerk, and that the location and alleged records offered by the defendant were invalid.

"The defendant also claimed that said Shaler made a re-survey of said premises on other rights, on the 6th of July 1845, recorded in said alleged records; to which the plaintiff also objected as being invalid.

"For the purposes of this trial the plaintiff's objections were sustained, and the court ruled that the proceedings and records relating to the supposed reorganization in 1842 were inadmissible as evidence.

"The defendant then offered to show by other evidence than the books of the proprietary, that on the 25th of October 1855 sixteen persons, who were proprietors of common lands in the proprietary, presented their petition to a magistrate, requesting him to issue his warrant for a meeting of the proprietary and for the purposes expressed in the warrant; that the warrant was issued and served; that legal notice was given to all persons proprietors; that a meeting was called on the 17th of November 1855, and thereupon an organization was had; and that the proprietors, at said meeting, recognized the location of said Shaler. For the purposes of this trial, the court rejected the above offer, and the defendant excepted."

J. E. Field & C. N. Emerson, for the defendant.

I. Sumner & H. L. Dawes, for the plaintiff.

Dewey, J. Upon the evidence disclosed in the case, the plaintiff established, as against a stranger to the true legal title, a good and sufficient possessory title to enable him to maintain an action of tort for disturbance of his possession, or, under the old form of pleading, an action of trespass *quare clausum*.

In this state of the case, the defendant was required, if he would maintain his defence, to show a better title. He failed to produce any sufficient evidence of an older title by possession. It has become important for him to show a good paper title.

The premises in dispute, it was conceded, were a portion of the land formerly belonging to the Housatonic Lower Proprietary. The defendant claimed title under the proprietary. His alleged source of title was a deed from Shaler Trowbridge. Trowbridge was not himself a proprietor or a member of the proprietary. But his great grandfather was, it seems, a brother of an original proprietor. It is unnecessary to say whether this would furnish any sufficient legal presumption of title in Shaler Trowbridge by descent; inasmuch as the facts in the case further show that the father of Shaler Trowbridge was an illegitimate child, and so could not inherit, and therefore no estate would pass to Shaler Trowbridge through his father, for he had no estate. The deeds from other heirs of the father, dated April 4th 1847, are obnoxious to the same objection.

A deed was also introduced from Jedediah Burrill, dated April 16th 1845, under which the defendant claimed a right to locate upon lands of the proprietary. The defendant also contended that he had made a location, and acquired title thereby, on the 23d of March 1845, as would appear from the records of the proprietary. In answer to this, the plaintiff denied the validity of that location, or that there were any proper officers of the proprietary, competent to act in the matter; and offered to show that there had been no proprietary meeting for fifty years previous to the year 1842; and that all those who had held offices in the proprietary were then deceased; which was conceded. The defendant thereupon attempted to set up a new organization of the proprietary in 1842. Such new organization required the calling of a meeting upon the request of five proprietors, and the evidence failed to prove that the five persons who called the meeting were proprietors. There was no sufficient evidence offered to show that the meeting of 1842 was a legal meeting, and none rejected by the court that was offered on that point. The court rejected the book of records as of itself showing a legal meeting, without further proof as to the persons who called it, &c., as was held in the case of *Stevens v. Taft*, 3 Gray, 487. The failure to establish the new organization of the proprietary in 1842 was not only fatal to the location

made in March 1845, under any deeds then existing, giving such right to locate, but equally so to the resurvey and location offered in evidence as having taken place on the 6th of July 1845, which was after the deed from Burrill.

The offer to show a regular organization of the proprietary on the 25th of October 1855 was properly rejected, being an organization subsequent to the commencement of the present action and the time of committing the alleged trespasses for which this action was brought.

In the aspect of the case, as it was presented on the trial, the presiding judge properly rejected the evidence as to locations made under the authority of the meeting of 1842; and we perceive no ground for exceptions, on the part of the defendant, to any rulings upon points material to the case. It becomes unnecessary to consider particularly the rulings of the court upon the paper title offered by the plaintiff, as, in the view we take of the case, the plaintiff was entitled to maintain his action irrespectively of that; and the verdict for the plaintiff should be sustained as correct in matter of law, and the only proper verdict upon the facts proved as to the possessory title of the plaintiff; the defendant having failed to show any title in himself controlling it.

Exceptions overruled.

ENSIGN D. STEVENS vs. ARCHIBALD TAFT & others.

Judgment for the tenant in a writ of entry is conclusive evidence of the title in a subsequent action of trespass by the demandant against the tenant for breaking and entering the same close; but is no bar to such an action.

TRESPASS for breaking and entering the plaintiff's close. Answer, a verdict and judgment recovered by the defendants upon an issue of nul disseisin, on a writ of entry brought by the plaintiff to recover the same land; since which the plaintiff had acquired no new title. The plaintiff demurred to the answer.

J. E. Field, for the plaintiff.

I. Sumner & B. Palmer, for the defendants.

BIGELOW, J. To support the plea in bar in this case, it must appear that there are no facts which, if proved, would enable the plaintiff to maintain this action, which were not in legal effect comprehended in the former verdict and judgment. The present action is trespass *quare clausum*, which the plaintiff can sustain by proof of a legal possession and a wrongful disturbance of it by the defendants. The former action was a writ of entry, in which the present plaintiff sought to recover the same premises as owner; upon a plea of nul disseisin, the verdict and judgment were for the tenants, the present defendants. By that action, the question of title only was litigated and conclusively settled between the parties; and it being now agreed that there has been no change of title since, it must be deemed to be conclusively settled, and cannot be again drawn in question in this suit. But the judgment in the former action was conclusive only on the question of title. That was the gist of the former action. The gist of the present action is the injury to the plaintiff's possession. The plaintiff may be entitled to possession of the estate, although he is not the owner, and the defendants are. For example: the plaintiff may be in possession of the premises, under the defendants, as tenant at will or for a fixed term; he may have become so since the former judgment was rendered; such tenancy would be entirely consistent with the ownership of the estate by the defendants, as determined in the former suit. A lessee, although entitled to possession of the premises as against his landlord, could not maintain a writ of entry against him for a disturbance of that possession; and, on the other hand, the landlord, although the owner in fee, could not justify a trespass on the premises leased to his tenant, by proof of his title. It follows therefore that, although no change of title, strictly speaking, has taken place since the rendition of the former judgment, there may be facts shown to exist which may well support this action, and which were not litigated or drawn in question in the former suit. *Merriam v. Whittemore*, 5 Gray, 316. *Sawyer v. Woodbury*, 7 Gray, 499. *Answer adjudged bad.*

First Universalist Society in North Adams & others v. Fitch & another, Administrators.

**FIRST UNIVERSALIST SOCIETY IN NORTH ADAMS & others vs.
WILLIAM FITCH & another, Administrators.**

A bequest of a certain sum to "the Universalist Religious Denomination in the county of Berkshire, as a permanent fund, the use to be applied annually for the support of that denomination," is not void for uncertainty; and if no trustee is named in the will, equity will appoint trustees to execute the trust, on a bill filed by the organized Universalist Societies of the county.

BILL IN EQUITY to enforce the following trust in the will, dated September 13th 1844, and proved December 6th 1852, of Sanford Fitch, of Alford, who died on the 30th of November 1852.

"I give and bequeath unto the Universalist Religious Denomination in the county of Berkshire the sum of one thousand dollars, as a permanent fund, the use to be applied for the support of that denomination. This thousand dollars to be loaned on mortgage of real estate to double the amount, exclusive of the buildings, and the use to be paid annually."

The plaintiffs are the First Universalist Societies organized in North Adams on the 9th of April 1852, in South Adams on the 28th of March 1844, and in Cheshire on the 23d of March 1849, respectively, and are the only Universalist societies in the county of Berkshire; but there are individual members of that denomination, residing in the county, and not parties to the bill. The testator directed that all the legacies should be paid in one year from his decease. The executors named in the will declined the trust. There were no other trustees named therein. The respondents are administrators with the will annexed. The case was submitted to the decision of the court upon the above facts.

H. L. Dawes, for the plaintiffs, cited *Bartlet v. King*, 12 Mass. 543, & cases cited; *Inglis v. Sailors' Snug Harbor*, 3 Pet. 117, 118, & cases cited; 1 Jarman on Wills, 315, 316; *Saunderson v. Stearns*, 6 Mass. 39; *Hall v. Cushing*, 9 Pick. 408, *Nash v. Cutler*, 19 Pick. 71; *St.* 1845, c. 158; *Bowditch v. Bameelos*, 1 Gray, 228; *Bliss v. Bradford*, 1 Gray, 409.

J. E. Field, for the defendants. 1. There was no association of individuals or body corporate by the name of "the Universal-

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ist Religious Denomination in the county of Berkshire," to whom the legacy could be paid within a year from the testator's decease. The bequest is void for uncertainty. 2 Story on Eq. §§ 1155, 1157, 1160, 1164, 1183. 1 Pow. Dev. 22, and cases cited. U. S. Dig. 1848, Charities, pl. 13-16. The testator lived near the southern extremity of the county; and it does not appear that he had any knowledge of either of the plaintiff societies, which were all established at the northern extremity, and one of which was not organized until after his will was made.

2. The other Universalists in the county of Berkshire should be made parties to the bill. *Tibballs v. Bidwell*, 1 Gray, 406. 2 Story on Eq. § 1526.

3. The plaintiffs can hold only so much estate as is necessary for the objects of their organization. Rev. Sts. c. 20, §§ 18, 29. If this is claimed as a donation to charitable uses, the suit should be in the name of the deacons. Rev. Sts. c. 20, § 39. *Parker v. May*, 5 Cush. 346. *Weld v. May*, 9 Cush. 181.

4. No suit can be maintained for a legacy without a previous demand. *Miles v. Boyden*, 3 Pick. 213. *Prescott v. Parker*, 14 Mass. 431.

5. The plaintiffs have an adequate remedy at law, by action for the legacy, or on the probate bond. Rev. Sts. c. 66, § 16. *Burbank v. Whitney*, 24 Pick. 154.

THOMAS, J. This is not a difficult case. There is reasonable certainty, both as to the subject matter and the object of the bequest. It is a gift of a definite sum for a definite purpose; of one thousand dollars to the Universalist Religious Denomination in the county of Berkshire, for the support of that denomination in the usual mode, in its organized parishes. The sum given is to constitute a permanent fund, and the use or interest to be applied for the support of the denomination.

To enforce and regulate the trust this bill is brought by the organized religious parishes of the Universalist denomination in the county of Berkshire. No trustees are named in the will; but it is familiar law that a court of equity will not suffer the trust to fail for want of trustees. The case may be sent to a master to report the names of three suitable persons as trustees.

Decree accordingly.

WILLIAM CARSON vs. WESTERN RAILROAD COMPANY.

A railroad corporation, which erects a fence on its own land, to keep the snow from being blown upon its road, is not liable for the damages occasioned by the accumulation of snow upon another's land on the other side of the fence.

ACTION OF TORT for the injury occasioned to the plaintiff's farm by the accumulation of snow thereon in consequence of the erection and maintenance of a fence by the defendants.

At the trial in the court of common pleas at June term 1857, the plaintiff offered to prove his title to the farm; that the defendants owned in fee a strip of land across his farm, on which their road was located, under a deed from the plaintiff's grantors, which contained a covenant that said grantors, and their heirs, should fence said road on both sides; that the fence complained of was erected and kept up by the defendants for the sole purpose of keeping the snow, coming from the direction of the plaintiff's farm, and which would, if not intercepted by said fence, drift along the natural course of the wind across the plaintiff's farm and upon the track of the defendants' road, from drifting and accumulating upon said track; that this fence caused such snow to fall and accumulate upon the land of the plaintiff to depths varying from eight to twelve feet, according to the severity of the winter, and to lie upon the plaintiff's lands from two weeks to a month later in spring than the snow would lie upon said lands, falling naturally, and drifting with the wind, unobstructed by said fence; that the snow so accumulating and lying upon the plaintiff's lands greatly injured them and lessened their value, keeping them from sunlight while so covered with snow, and leaving them cold and wet for some time after the snow dissolved, rendering them unfit for cultivation, or for the production of any other crop than grass, and materially injuring the growth of that crop; and breaking down and retarding the growth of an orchard of young fruit trees.

Upon this opening, *Sanger, J.* ruled that the action could not be maintained, and rendered judgment for the defendants. The plaintiff alleged exceptions.

Carson v. Western Railroad Company.

I. Sumner & N. L. Johnson, for the plaintiff, cited Com. Dig. Action on the Case for a Nuisance, A, B; 2 Dane Ab. c. 69; 3 Bl. Com. 217; 3 Kent Com. (6th ed.) 439, 440; *Renwick v. Morris*, 3 Hill, 621, and 7 Hill, 575; *Mellen v. Western Railroad*, 4 Gray, 301; Vin. Ab. Nuisance, G, pl. 19; 2 Rol. Ab. 704.

J. Rockwell, for the defendants, cited *Smith v. Kenrick*, 7 C. B. 515; *Wyatt v. Harrison*, 3 B. & Ad. 871; *Lawrence v. Great Northern Railway*, 16 Ad. & El. N. R. 643; *The King v. Pease*, 4 B. & Ad. 30; *Aldridge v. Great Western Railroad Co.* 3 Man. & Gr. 515; *Acton v. Blundell*, 12 M. & W. 324; *The King v. Commissioners of Sewers*, 8 B. & C. 355; *Barnard v. Poor*, 21 Pick. 378; *Howland v. Vincent*, 10 Met. 371; *Thurston v. Hancock*, 12 Mass. 220.

BIGELOW, J. The plaintiff does not allege or offer to prove that the defendants, in erecting the fence, acted wantonly, negligently or maliciously, or with any purpose of inflicting injury on him or his property. On the contrary, it appears that the fence was built on land belonging to the defendants, for the legitimate object of preventing the track of their road from being incumbered with snow. This was certainly a proper and reasonable use of their own property; and although it may have caused annoyance or injury to the plaintiff or his property, it gives him no cause of action. Such acts do not fall within the maxim, *sic utere tuo ut alienum non lædas*, but within another legal apophthegm, *qui jure suo utitur neminem lædit*. *Howland v. Vincent*, 10 Met. 371.

The agreement in the deed to the defendants, by which the plaintiff's grantors and their heirs undertook to build and maintain the fence between the land now owned by the plaintiff and that of the railroad, has no bearing on the question at issue in this cause. That related only to the division fence between the parties, and cannot operate to prevent the defendants from erecting on their land and at their own expense a fence or other barrier necessary or convenient to protect their track from accumulations of snow, which might delay public travel and require the defendants to expend money in removing them.

Exceptions overruled.

Horton & another v. Wilde.

SAMUEL F. HORTON & another vs. ALDEN WILDE.

A submission to arbitration under the Rev. Sts. c. 114, executed and acknowledged by one partner in behalf of his firm is void; and a judgment rendered on the award will be reversed on error.

On the reversal by writ of error of a judgment which has been satisfied by a levy and extent upon land, the court will not order restitution, but will leave the plaintiff in error to his writ of entry.

WRIT OF ERROR sued out by Samuel F. Horton and Warren Delano, Jr. to reverse a judgment of the court of common pleas, in favor of Alden Wilde against them jointly, upon an award of referees under a submission entered into before a justice of the peace, under the Rev. Sts. c. 114.

The error assigned was, that Delano did not sign or acknowledge the submission, nor appear before the referees, and that the referees therefore had no jurisdiction. The submission recited that Horton & Delano and Wilde had agreed to submit "all demands and matters in difference between them, the said Horton & Delano of the one part, and the said Wilde of the other part;" was signed by Horton and Wilde only; and bore a certificate of a justice of the peace that "the above named Samuel F. Horton for said Horton & Delano and the said Wilde personally appeared and acknowledged the above instrument by them signed to be their free act and deed." The referees, after reciting that Horton and Wilde appeared and were heard before them, awarded that Wilde recover of Horton & Delano a certain sum and costs.

The plaintiffs in error also represented to the court, that it appeared by the records of the court of common pleas, that the judgment complained of was satisfied by the levy and extent of an execution issued thereon upon real estate, which was of greater value than the sum at which it was appraised to satisfy the judgment; and that the defendant in error had no property, and a judgment against him for damages would be of no value. Wherefore they prayed the court, upon the reversal of the judg-

ment, to issue a writ of restitution, or other proper process, to restore the land specifically to them.

G. Walker, for the plaintiffs in error. 1. The submission was not signed by or in the name of Delano, one of the original defendants, against whom judgment was rendered; the referees therefore had no jurisdiction, and all their proceedings and those of the court of common pleas are void. Rev. Sts. c. 114, § 2. *Abbott v. Dexter*, 6 Cush. 108.

2. The judgment having been satisfied by levy and extent of an execution upon real estate, the plaintiffs in error, upon reversal, are entitled, by the rules of the common law, to a restitution of the land set off on the execution, even if it has passed into other hands. By Jackson, J. in *Cummings v. Noyes*, 10 Mass. 434. *Jones v. Hacker*, 5 Mass. 264. *Goodyer v. Junce*, Yelv. (Amer. ed.) 179 *d*, & note. Tidd's Pract. (1st Amer. ed.) 1138. Bac. Ab. Error, M. 3. 2 Paine & Duer's Pract. 439. Co. Ent. 231 *a*, 252 *a*, 272 *a*, 296 *a*. The Rev. Sts. c. 112, § 15, provide that "the proceedings upon writs of error, as to the judgment, and all other matters not herein provided for, shall be according to the course of the common law," except as modified in practice or by the general rules of this court. And the Rev. Sts. c. 92, §§ 8, 9, recognize this right by providing that, upon review, the defendant may have restitution, "in like manner as upon a reversal upon writ of error."

M. Wilcox, for the defendant in error. 1. This submission differs from that in *Abbott v. Dexter*, 6 Cush. 108, in being acknowledged by one partner in behalf of both. But if not binding on the one who did not sign it, it should at least be held binding on him who did, and the award and judgment should not be set aside as to him.

2. In this commonwealth, the only judgment to be rendered by this court, upon a writ of error in a civil action, is "such judgment as the court of common pleas should have rendered." Rev. Sts. c. 82, § 20. If the plaintiffs in error have any title to the land, they can assert it by writ of entry. In fact, the land taken on execution has been conveyed to an innocent purchaser.

BY THE COURT. 1. The case of *Abbott v. Dexter*, 6 Cush.

Chappell v. Hunt.

108, is directly in point to show that this submission and the award rendered thereon were utterly void.

2. We have not facts enough before us to enable us to determine the title of the plaintiff in error to the land. But that is immaterial. It is a simple case of levy of execution by appraisement upon a parcel of land. If the title has passed to another person, so that the plaintiff in error has no right, the order prayed for would not help him. If, on the other hand, he has a right to the land against the party now holding it, he can maintain a writ of entry. *Judgment reversed.*

WILLIAM CHAPPELL vs. JOSEPH HUNT.

A levy of execution on land by appraisement, which does not state in what town the land is, and which describes the land only as bounded on a certain highway, and thence by specified courses and distances to stakes and stones, and back to the highway, is valid, if, by parol evidence of the bounds so given, the land can be identified to the satisfaction of a jury. But the testimony of the officer and appraisers as to what land is intended to be set off is inadmissible.

The return of an officer upon an execution levied on land, that one of the appraisers was chosen by "A. B., the attorney of the debtor," sufficiently shows that one appraiser was chosen by the debtor, within the provision of the Rev. Sts. c. 73, § 23.

WRIT OF ENTRY to recover land in Otis. The parties submitted the following case to the decision of the court.

The tenant claims title under a levy of execution on a judgment recovered by him against the demandant.

The land set off was thus described in the appraisers' certificate: "Beginning at a stake and stones standing the north side of the highway; thence north 15° east, twenty five rods and thirteen links to a stake and stones; thence north 58° east thirty one rods to a stake and stones; thence north 72½° east seventeen rods to a stake and stones; thence south 1° east twelve rods to a stake and stones; thence south 30° east twenty five rods ten links to a stake and stones; thence south 15° east sixteen rods to a

stake and stones; thence south 84° west thirty nine rods to a stake and stones; thence north 54° west eleven rods to a stake and stones; thence south 59° west eleven rods to the highway; thence on the highway north 54° west twelve rods to the first mentioned bounds; containing thirteen and a half acres of land."

The return of the officer commenced thus: "Pursuant to the within execution, I have caused three disinterested and discreet persons, freeholders of the said county, to be sworn as above, namely, Willis Strickland, chosen by the within named Joseph Hunt, the creditor; Chauncy Phelps, chosen by Chester Cornwall, the attorney of the debtor; and Elam P. Norton, chosen by myself; who afterwards viewed the above described land."

If parol evidence is competent, the tenant offers to show by the testimony of the appraisers and the officer, that the premises described in the appraisers' certificate are situated in the town of Otis, and are part of the premises embraced in the demandant's writ.

The demandant objects to the competency of this evidence, and contends that no title passed to the tenant by the alleged levy; because no town or place where said land is situated is stated; because no appraiser was chosen by the demandant, nor any notice given him to choose one, nor any chosen for him by the officer; and if the testimony is competent, the demandant (if it becomes necessary) offers to show that Chester Cornwall was not his attorney, and had no authority to act.

I. Sumner, for the demandant. 1. The parol evidence offered by the defendant is inadmissible. *Phillips v. Williams*, 14 Maine, 411. *Munroe v. Reding*, 15 Maine, 153. *Grover v Howard*, 31 Maine, 546. *Jackson v. Woodman*, 29 Maine, 266. *Gorham v. Blazo*, 2 Greenl. 232. *Crawford v. Spencer*, 8 Cush. 118. *Williams v. Amory*, 14 Mass. 20. *Allen v. Thayer*, 17 Mass. 299. *Litchfield v. Cudworth*, 15 Pick. 23.

2. The levy is defective and void, because it does not state in what town or place the land is located. *Jackson v. Catlin*, 2 Johns. 248. *Jackson v. Delancy*, 13 Johns. 537. *Jackson v. Rosevelt*, 13 Johns. 97. *Munroe v. Riding*, 15 Maine, 153. *Mead v.*

Chappell v. Hunt.

Harvey, 2 N. H. 498. *Libbey v. Copp*, 3 N. H. 45. *Atwood v. Atwood*, 22 Pick. 283. *Eells v. Day*, 4 Conn. 95. *Den v. Love*, 4 Ired. 38. *Morton v. Edwin*, 19 Verm. 77. *Gibbs v. Thompson*, 7 Humph. 179. *Gault v. Woodbridge*, 4 McLean, 329.

3. The levy is void, because it does not show that Chappell appointed one of the appraisers, nor that he neglected or refused to appoint one. Rev. Sta. c. 73, § 23. *Leonard v. Bryant*, 2 Cush. 32. The return of the fact that Cornwall was the debtor's attorney was upon a matter not within the jurisdiction of the officer, and therefore not conclusive.

M. Wilcox, for the tenant.

BIGELOW, J. The broad proposition, urged by the demandant's counsel, that it is essential to the validity of a levy, that the appraisers' certificate or the officer's return should name the town where the land set off is situated, cannot be sustained. All that is necessary is, that the land should be described "by metes and bounds, or otherwise, with as much precision as is necessary or proper in any common conveyance of land, and in such manner that the premises may be known and identified." Rev. Sta. c. 73, § 5. In many cases the location of land could be determined accurately without naming the town in which it was situated. If, for example, it was described as being bounded by a particular pond or stream of water, its location would be readily ascertained. The name of the town would not fix its identity more precisely.

Nor can we say, as a matter of law, that the description in the appraisers' certificate of the premises on which the levy was made is so defective and uncertain as to render it invalid. This is a question of fact to be settled by a jury. If a lot of land could be proved to exist in the county, containing the exact quantity, and with boundaries, courses, distances and monuments exactly corresponding with those named and set out in the appraisers' certificate, it would make out a case of very strong identity, sufficient to sustain the levy, or, if the description was found very nearly to resemble an actually existing lot or parcel of land, it would probably be adequate proof of identity to satisfy a jury. The practical rule in such cases is, that

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the land set off must be found and identified on the earth's surface by the description contained in the return of the officer or the appraisers' certificate, so that, taking this description alone and applying it to the land, unaided by extrinsic proof, the premises can be ascertained. But on the trial of this question of identity, the testimony of the officer or appraisers, that any particular piece of land was intended to be set off, or was actually levied upon, would be inadmissible. The identity must be determined solely by the description, so that a stranger, guided by that alone, would be able to fix and designate the premises.

The appointment of an appraiser was duly made. An appointment by the authorized agent of the debtor was equivalent to an appointment by the debtor himself. The authority of the agent cannot be disputed in this action. The return of the officer is conclusive on this point. *Bates v. Willard*, 10 Met. 80. *Woodworth v. Ranzehousen*, 7 Cush. 430.

Facts discharged.

LUTHER H. WASHBURN vs. PATRICK CUDDIHY.

Books of medical or veterinary practice cannot be read to the jury in argument. Cribbiting, affecting the health and condition of a horse, so as to render him less able to perform service and of less value, is unsoundness.

ACTION OF CONTRACT on a warranty of soundness of a horse exchanged by the defendant with the plaintiff for another horse. Trial in the court of common pleas at October term 1856, before *Briggs, J.*, who signed this bill of exceptions :

"The unsoundness alleged was, that the horse was a cribber, and that he was so affected by that complaint or disease that he was rendered much less valuable. The plaintiff offered evidence to prove the warranty in that respect, and as to the character of the horse in other respects ; and he also offered evidence tending to show that said horse was a cribber before and after the exchange, and that his health and flesh were injuriously

affected by cribbing. The defendant offered no evidence on this point. The plaintiff also offered evidence tending to prove that said horse was vicious in double harness.

"In opening the defence, the defendant's counsel contended that the cribs, or the habit of cribbing, was not an unsoundness in a horse, but a habit, and was proceeding to read to the jury, from Dr. Dodd's Veterinary Surgeon, a description of the habit of cribbing in horses, as a better mode of showing what cribbing was, but not, he said, as evidence in the case. The plaintiff's counsel objected to his thus reading, and the court sustained the objection and refused to let him proceed in reading.

"The defendant's counsel also asked the court to instruct the jury, as a matter of law, that cribbing was not an unsoundness in a horse, for which an action could be maintained in an alleged breach of warranty of soundness. The court declined so to instruct the jury.

"But the court did instruct the jury, that whether the horse in this case was a cribber or not, and, if he was a cribber, whether his health and condition were so affected by it as to render him less able to perform labor and service and of less value, were facts for the jury; and if they were satisfied from the evidence that the horse was injuriously affected in his health and flesh, so as to be less able to perform service and rendered of less value, he would be entitled to recover, as damages for that defect, the amount that he was so affected; that the burden of proof was on the plaintiff to show that the horse had the cribs, and that he was rendered less valuable by them. To which rulings and instructions the plaintiff excepts."

J. E. Field & J. Price, for the defendant.

W. T. Filley, for the plaintiff.

THOMAS, J. 1. In refusing to allow the counsel to read from works of medical or veterinary practice to the jury, the presiding judge conformed to the now well settled practice in this commonwealth. *Ashworth v. Kittridge*, 12 Cush. 193. *Commonwealth v. Wilson*, 1 Gray, 337.

2. The court rightly refused to rule as matter of law that

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cribbing was not unsoundness in a horse. As indications of approaching disease fall under that term, it would be difficult to say cribbiting was not unsoundness. A cribbiter will not retain his condition or be fit for constant work. Stephen's Adventures of a Gentleman in Search of a Horse, (Amer. ed.) 243. *Onslow v. Eames*, 2 Stark. R. 81. Oliphant on Horses, 38, 39.

The question of unsoundness was a mixed question of law and fact, and submitted to the jury under instructions correct in principle and carefully and accurately stated.

Exceptions overruled.

ANN WILBUR vs. JOHN HICKEY.

The St. of 1855, c. 238, exempting a homestead from levy on execution, and from conveyance by the owner, unless his wife joined in the deed, did not prevent the estate from being sold by license of the probate court upon the husband's becoming a spendthrift.

WRIT OF ENTRY by the wife of Darling Wilbur to recover a house and farm in Adams, less than \$800 in value, for ten years owned and occupied by him and his wife and family of children as a homestead. Said Darling was adjudged by the probate court to be a spendthrift, and a guardian was duly appointed for him, who, pursuant to a license from that court, sold and conveyed the premises to the tenant, for Darling's support and maintenance, and for the payment of his debts, nearly all of which were contracted since the passage of St. 1855, c. 238. The tenant, upon receiving this conveyance, entered upon the premises, ousted the demandant, and has since remained in possession. The demandant did not join in said conveyance to the tenant, and has never released or abandoned her right in the premises. The parties submitted the case to the decision of the court upon the above facts.

A. J. Waterman, for the demandant. By St. 1855, c. 238, 'in addition to the property now exempt by law from sale or

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levy on execution, there shall be exempted, to the value of eight hundred dollars, the homestead farm, or the lot and buildings thereon, occupied as a residence and owned by the debtor." § 1. "Such exemption shall continue after the death of such householder, for the benefit of the widow and children of the deceased party, some one of them continuing to occupy such homestead, until the youngest child be twenty one years of age, and until the death of the widow." § 2. "No conveyance by the husband, of any property exempted as aforesaid, shall be valid in law unless the wife join in the deed of conveyance." § 5. See also *Richards v. Chace*, 2 Gray, 384. The guardian of the husband stands in his place, and has no more power over the interest of the wife than he had.

H. L. Dawes, for the tenant, was stopped by the court.

METCALF, J. By St. 1855, c. 238, § 1, a homestead of the value of \$800 is exempted from levy on execution. This is not an exemption from sale by the guardian of the owner, for payment of his debts and for his support and maintenance, upon a license of the court of probate; and we cannot extend the exemption beyond the terms of the statute.

Judgment for the tenant.

ANDREW J. WATERMAN vs. TROY AND GREENFIELD RAILROAD COMPANY.

An agreement of a railroad corporation with a subscriber for stock therein, that he "shall have the privilege of paying in at any time the whole or any part of his subscription, and shall receive interest thereon until the road goes into operation," does not bind the corporation to pay him any interest until the road goes into operation.

ACTION OF CONTRACT by the assignee of six shares in the defendants' capital stock, to recover interest thereon under the following agreement made between the defendants and the original subscribers:

"We, the subscribers associated in this enterprise, do hereby severally agree with said corporation to take the number of shares placed against our names respectively, upon the following terms and conditions, viz: until the proposed railroad is put in operation, interest shall be allowed upon all sums assessed and paid in, and each subscriber shall have the privilege of paying in at any time the whole or any part of his subscription, and shall receive interest thereon until the road goes into operation."

At the trial in the court of common pleas at October term 1855, it appeared that the original certificates of these six shares had been surrendered to the defendants, and they had issued to the plaintiff new certificates; and that the plaintiff, more than a year afterwards, had demanded payment of the interest on his shares. It was also proved that the defendants' road had not been put in operation.

Byington, J. ruled "that the plaintiff could not maintain his action upon the facts proved, there being no privity of contract between the plaintiff and the defendants." A verdict was taken for the defendants, and the plaintiff alleged exceptions.

J. T. Robinson, (*T. Robinson* with him,) for the plaintiff

H. L. Dawes, for the defendants.

BIGELOW, J. This is not a case where interest is claimed as incident to a principal demand; but it is an action on an agreement for the payment of interest alone, as an independent, substantive debt. No time is expressed in the contract for its payment. The question is, whether any can be fairly inferred from the terms of the contract; and if so, whether this action can be maintained for the interest which has already accrued on the assessments paid on the shares held by the plaintiff. To decide this question, it is necessary to consider the nature of the agreement and the objects which the parties had in view in making it. The defendants were constructing a railroad, and necessarily required a large sum of money to meet their current outlay. To induce persons more readily to aid in the undertaking, they agreed, by the terms of subscription for the stock, that all assessments on shares, when paid, should bear interest

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By this stipulation, subscribers avoided the loss which they would otherwise incur, if, after their assessments were paid in, no interest was to accrue thereon till the road was completed and in operation. Such being the purpose of the agreement to pay interest, it is unreasonable to suppose that the defendants intended to agree to pay it to subscribers, while the road was in process of construction and when they would require their funds to defray the necessary charges of building the road, and before they were in the receipt of any income. It is much more in accordance with the object which the parties had in view, to infer that interest was to be paid after the assessments had all been paid in, the road completed and in operation, and they were in the receipt of income from its business. We think, therefore, it was an agreement to pay the interest when it had ceased to accrue, that is, when the road was in operation. If this is not so, there can be no fixed time designated for its payment. It would be payable on demand. Each subscriber might make a demand at his own pleasure, monthly, quarterly, semi-annually or yearly, or at other intervals of time. The result would be that the defendants would be harassed by constant and irregular demands of payment by each stockholder; necessarily leading to great confusion of accounts and embarrassment in the management of their finances.

It being proved that the road of the defendants is not yet in operation, the plaintiff fails to show that his claim for interest is due.

Exceptions overruled

MILTON JUDD vs. LEVI GIBBS & another.

By the Rev. Sts. c. 101, §§ 15, 24, an application for the assessment of rents and profits upon a writ of entry cannot be made after verdict for the demandant on the title, unless an order is passed by the court, before such verdict is recorded, postponing the assessment.

DEWEY, J. This is an application by the demandant for further proceedings in a real action, in which a verdict was rendered

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in his favor at the last September term of this court, and subsequently judgment rendered thereon, but no execution or further process issued. The object of the demandant is to have damages assessed in this action for the rents and profits of the premises, during the time for which they have been occupied since his title accrued.

The objection of the tenants is, that the application for a recovery of rents and profits comes too late. The Rev. Sts. c. 101, § 15, enact that if an issue of fact is tried in any real action, and found for the demandant, the jury shall, at the same time, assess his damages for the rents and profits, unless it shall be otherwise ordered by the court, as hereinafter provided. Section 24 makes the further provision, that if it shall appear to the court, on the motion of either party, that it would be more convenient to postpone the assessment of the sums due to the demandant for rents and profits, until after the trial of the title and a verdict thereon, the court may make an order for that purpose, at any time before the verdict on the title is recorded.

This application comes too late. If the case were properly before us, therefore, and waiving all question arising as to the same being properly on the docket, this motion must be denied. The only mode of effecting the object would be for the demandant to obtain leave to set aside the verdict generally, and on a future trial to submit, with the question of title, his demand for rents and profits; or procure an order from the court, before the verdict was taken and recorded, postponing the assessment of damages for rents and profits. This the demandant does not desire to do. The result is therefore that the petition must be dismissed.

H. L. Daves, (I. Sumner with him,) for the demandant.

J. Rockwell, for the tenants

Lester v. Lester. Maher v. Dougherty.

HANNAH LESTER vs. JOHN LESTER.

A writ against one personally may be amended by leave of court, so as to charge him in his capacity as administrator.

ACTION OF CONTRACT by a daughter of Silas Lester to recover the support provided in the will of her father. The writ was against the defendant personally, and his estate was attached thereon. The plaintiff moved to amend so as to charge the defendant as administrator, with the will annexed, of Silas Lester. *Bigelow*, J. reserved the motion for the consideration of the full court, who allowed the amendment, upon the terms that the plaintiff should discharge her attachment and pay costs to this time, and, in case she should finally prevail, should take no costs up to this time.

J. Price, for the plaintiff.

I. Sumner, for the defendant.

THOMAS MAHER vs. GEORGE DOUGHERTY.

In an action for the price of intoxicating liquors, the declaration need not state that the sale was authorized by law.

ACTION OF CONTRACT for goods sold by the plaintiff to the defendant, which appeared by the bill of particulars filed with the declaration to be spirituous and intoxicating liquors, sold at various times extending from September 9th 1854 to March 21st 1856. The defendant demurred to the declaration, because it did not state that the liquors were sold within any of the exceptions of the statutes of this commonwealth prohibiting the sale of intoxicating liquors. The court of common pleas overruled the demurrer, and the defendant excepted.

J. Price, for the defendant.

THE COURT, without calling upon *J. T. Robinson*, for the plaintiff,

Overruled the exceptions.

Scoville v. Smith. Collins v. Stephenson.

SAMUEL C. SCOVILLE vs. SILAS SMITH.

No appeal lies from the determination of the court of common pleas under the Rev. Sts. c. 107, § 5, of the amount for which conditional judgment shall be entered on a writ of entry to foreclose a mortgage, unless the record shows that a question of law was involved.

WRIT OF ENTRY to foreclose a mortgage. The defendant claimed an appeal from a conditional judgment entered in the usual form by the court of common pleas. But *Sanger*, J. refused to allow the appeal, and to this refusal the defendant alleged exceptions.

I. Sumner & J. Rockwell, for the defendant, cited Rev. Sts. c. 107, § 5; c. 82, § 6; St. 1840, c. 87, § 5.

H. L. Dawes & C. N. Emerson, for the plaintiff, were stopped by the court.

BY THE COURT. The determination by the court of common pleas, pursuant to Rev. Sts. c. 107, § 5, of how much is due to the plaintiff on the mortgage, on payment of which the defendant is to hold the premises, involves a mere computation of amounts, and, unless it appears on the face of the record that a question of law was involved in the decision, no appeal lies. St. 1840, c. 87, §§ 4, 5. *Exceptions overruled.*

ELISHA COLLINS vs. FRANCIS STEPHENSON.

Testimony that certain statements were made to a witness cannot be contradicted by evidence that the statements to which he testifies were not true.

The defendant in an action of slander, in order to rebut the inference of malice from certain statements made by him of the plaintiff's difficulties with his wife, offered to prove "that the plaintiff's wife had in fact complained of his abuse in connection with her leaving him at a certain time." *Held*, that an exception to a refusal to admit this evidence could not be sustained.

A witness, who, being called by one party, testifies that he has never threatened revenge against the other party, may be contradicted on this point by other testimony.

ACTION OF TORT for slander in charging the plaintiff with adultery. Trial in the court of common pleas at October term 1856, before *Briggs*, J.

Alonzo Stafford, a witness called by the plaintiff, testified to the slanderous words alleged; and, in connection with the alleged slander, testified that the defendant stated that the plaintiff, in various particulars, maltreated his wife and had difficulty with her. In order to show malice in the defendant, Stafford was then permitted to testify that the plaintiff's wife, in a subsequent interview with the witness, negatived the defendant's statements, and gave a long detailed account of the origin and cause of any difficulty between her and her husband, implicating both the defendant and Hiscox, the clergyman of the religious society to which the parties belonged, as having occasioned the difficulties. Stafford also testified that he communicated the account given him by the plaintiff's wife to the defendant, who replied, "Don't you believe any such thing. Collins has so used his wife, that she will say just what he wants her to; she is so afraid of him."

In reply to this, the defendant offered to prove "that all the statements related by said Stafford as having been made to him by plaintiff's wife were untrue, as evidence tending to show that the evidence of Stafford in regard to said statements was also untrue." But the court ruled that the evidence was inadmissible.

The defendant then offered to prove, by said Hiscox, "that the plaintiff's wife had in fact complained of his abuse in connection with her leaving him at a certain time." But this evidence was objected to by the plaintiff and excluded by the court.

Hiscox having been examined as a witness for the defendant in the case, the plaintiff, upon cross-examination, inquired of him if he had ever threatened revenge upon the plaintiff; to which he answered that he had not. Whereupon, for the purpose of discrediting Hiscox, the plaintiff offered to testify that he had so threatened. The defendant objected; but the court permitted the plaintiff so to testify; and he did testify to threats of revenge made against him by said Hiscox.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

I. Sumner & J. Price, for the defendant.

M. Wilcox, for the plaintiff.

THOMAS, J. 1. The testimony offered to contradict Stafford was rightly excluded. It would not contradict him. Stafford had testified to statements made by the plaintiff's wife, which were related by the witness to the defendant, and to the defendant's reply and remarks thereupon. It was only as the inducement to what was said by the defendant, as part of the conversation with him, and as necessary to the understanding of the reply and remarks of the defendant, that the declarations of the wife were competent evidence. The plaintiff did not offer to show that the wife did not make the statements which the witness had repeated to the defendant; but that the statements were not true. Whether they were true or not was not the question. Stafford had not averred their truth or falsity; but that he had the statements from the plaintiff's wife, repeated them to the defendant, and that he thereupon made certain declarations as to the plaintiff.

2. We have to regret that upon the second exception we have not a more precise statement of what the evidence offered was. Upon the bill of exceptions as it stands, it was an offer by the defendant to prove generally that the wife complained of the abuse of her husband in connection with her leaving him. If the offer had been simply to show that the wife left the house of her husband, and, at the time of leaving, and as part of the act, declared her reason for going, it might have been competent. But the rule of the *res gestæ* would not render competent any narrative as to the past conduct of her husband, or detailed statement of any abuse. The ground upon which the competency of the evidence was put at the argument we may fairly presume to have been that suggested at the trial; and that was its tendency to rebut the inference of malice and ill will in the defendant. But the objection is not to the fact to be proved, but to the method of proof—to the declarations of the wife of the plaintiff, incompetent because without the sanction of an oath, and because of the relation between the parties. It does not appear by the report that the testimony offered was compe-

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tent, and the exception must therefore be overruled. To sustain an exception for the exclusion of evidence, it is not enough to show that, under some circumstances and with certain limitations, the evidence might be competent. If the existence of particular facts is necessary to make the evidence offered competent, these must appear in the bill of exceptions. *Parmenter v. Coburn*, 6 Gray, 509.

3. The evidence to discredit Hiscox was competent. The matter upon which he was contradicted was not collateral, but the state of the witness's mind and feelings towards the plaintiff—affecting directly the credit and weight to be given to his testimony. *Folsom v. Brawn*, 5 Foster, 114.

Exceptions overruled.

SLOAN POWELL vs. AARON BAGG.

If the owner of land, while on the land, forbids the owner of adjoining land to enter thereon, and orders him off while there for the purpose of repairing an aqueduct under claim of an easement in the aqueduct by adverse possession, such verbal orders, though unaccompanied by further acts, are admissible in evidence of an interruption of the easement.

ACTION OF TORT for breaking and entering the plaintiff's close in Lanesborough, and digging up the soil, on the 16th of July 1855. The defendant admitted the entry and digging, and claimed the right to do so to repair an aqueduct laid down across the plaintiff's land.

At the trial in the court of common pleas at October term 1856 before *Bishop*, J., the defendant called Oren J. Farnum, under whom the plaintiff claimed title, who testified "that about thirty eight years ago the defendant laid down this aqueduct, which conveyed water from a spring on the land of his father, John Farnum, across the *locus*, to the house and barn of the defendant; that said aqueduct was first of logs, and, some years after, lead pipes were laid down in their place; that from the time the aqueduct was laid down to the time of the alleged trespass the defendant had enjoyed said aqueduct, and from

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time to time, as occasion required, entered upon the plaintiff's land and made repairs; that he had never heard any objection by the owners or occupants of the land."

There was evidence tending to show that the plaintiff had forbidden the defendant's entry upon the premises for the purpose of repairing the aqueduct; and had ordered him and his servants off, when there, making repairs. The plaintiff requested the judge to instruct the jury "that, as respects the pacific and uninterrupted character of the enjoyment or user, by the civil law, any enjoyment or user was deemed forcible to which opposition was offered, either by word or deed, by the owner of the servient tenement." The judge refused to give such instruction, and instructed the jury "that words, however strongly denying the rights claimed by the defendant, or forbidding their exercise, unaccompanied by any act or deed, were not an interruption of the defendant's user and enjoyment;" and "that if they found, from all the evidence in the case, that the defendant had used said aqueduct, conveying water as now, either in logs or in lead pipes, across the plaintiff's land, and had used the same continually and uninterruptedly for more than twenty years before the trespass complained of; that this was known to the owners of the land, and the defendant had entered and made repairs from time to time, with their knowledge, and there was no further evidence, either of permission or of dissent, during the whole time, on the part of the owners of the land, the jury might presume that said user was adverse, and under a claim of right thereto." The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

M. Wilcox, for the plaintiff.

J. Rockwell, for the defendant.

BIGELOW, J. The right which the defendant claimed in the plaintiff's land was to enter and dig up the soil for the purpose of repairing an aqueduct, which conducted water to the defendant's premises. This right was not founded on an express grant, but on adverse user and enjoyment of more than twenty years. Upon the question of a title to an easement thus acquired, it was clearly competent to show that, when the defendant

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attempted to exercise it, he was forbidden by the owner to enter on the land, and that he and his servants were ordered off of the premises. If this was proved to have been done by the plaintiff in good faith, as an assertion of his own absolute title to the land and a denial of any right of the defendant therein, it tended to negative the defendant's prescriptive title to the user and enjoyment of the easement to enter and dig up the soil. It was not necessary for the plaintiff to commit an assault and battery on the defendant or his servants, or to use actual force to eject them from the premises, in order to disturb and break the continuity of possession or use, and prevent it from ripening into a title by lapse of time. An easement in the land of another can be acquired by adverse user only, with the acquiescence of the owner of the land in its exercise under a claim of right, *per patientiam veri domini, qui scivit et non prohibuit, sed permisit de consensu tacito*. Bract. lib. 2, c. 23, § 1. 2 Greenl. Ev. § 539. *Sargent v. Ballard*, 9 Pick. 254. *Arnold v. Stevens*, 24 Pick. 112. See also *Monmouthshire Canal v. Harford*, 5 Tyrwh. 85, and 1 Cr., M. & R. 631.

From such use of an easement for twenty years, the law will presume a non-appearing grant. But before the lapse of that period, if the owner of land, by a verbal act on the premises in which the easement is claimed, resists the exercise of the right and denies its existence, the presumption of a grant is rebutted, his acquiescence in the right claimed is disproved, and the essential elements of a title to an easement by adverse use are shown not to exist. On this point, the instructions given to the jury were defective, and tended to mislead them in applying the evidence to the rule of law, on which the title of the defendant to the easement depended. They should have been told, and this is the precise point on which we sustain the exceptions, that if it was proved that, before the expiration of twenty years from the time when the right was first claimed, the plaintiff, being on the land upon which the defendant entered for the purpose of subverting the soil, there forbade him to exercise his right, and ordered his servants to desist, it was sufficient to warrant the jury in finding that the plaintiff had not acquiesced in

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the adverse use of the easement, and that the defendants had not acquired a title thereto.

This is not a case where a title to land is claimed by adverse possession, and where the true owner is disseised. If such disseisin continues for the requisite period, the presumption of a grant will arise, and a mere verbal prohibition to occupy the premises may not be sufficient without an entry to rebut that legal presumption. The owner, in that case, would still be disseised. But the title to an easement by adverse user stands on different ground. The owner remains in possession of the premises; there is no disseisin; the title rests chiefly on his acquiescence in the adverse use, and evidence which disproves such acquiescence rebuts the title to the easement.

Exceptions sustained.

 INHABITANTS OF GREAT BARRINGTON vs. EDWARD AUSTIN & others.

A bond, the execution of which is admitted, reciting the principal obligor's appointment as collector of taxes, is sufficient evidence of his being such collector in an action on the bond against him and his sureties, to recover money received by him for taxes and not accounted for; notwithstanding oral evidence that the office was put up at a town meeting for sale by auction, and was bid off by another person in his absence for him.

For the purpose of proving that seals were duly appended to a bond, the plaintiff was permitted to ask the draftsman whether seals of the same kind were used in his office at the time of drafting this bond; and he testified that he had seen and used such seals there, but could not say whether any were there at that time. *Held*, that an exception to the admission of the question could not be sustained.

ACTION OF CONTRACT upon a bond, dated March 12th 1855, executed by the defendant Austin as collector of taxes of Great Barrington for 1855, as principal, and the other defendants as his sureties, and reciting that, "at the annual town meeting of said inhabitants, this day legally held, the said Edward Austin has been this day duly chosen collector of taxes for the current year and until another shall be duly chosen and sworn in his stead," to recover a balance of money received by him for taxes, and not accounted for or paid over by him.

Austin was defaulted, and a trial of the action against the sureties was had in the court, of common pleas at June term 1857, before *Sanger*, J., who signed a bill of exceptions, the material part of which was as follows :

“ The plaintiffs did not attempt to show by the town records of that year the election or qualification of Austin as collector ; but relied upon the recitals in the bond, the warrant and the tax lists that were given him as collector, and upon proof of the fact that he acted as collector, as *prima facie* evidence of his being collector. The town clerk of Great Barrington for that year was called by the plaintiffs ; and testified, on cross-examination, “ that, at the annual town meeting of that year, the office of collector of taxes was put up at auction to the lowest bidder ; that Austin (who had been the collector of the previous year) was present at the meeting, before and after the time when the office was so put up at auction, but at that time he was not present in the meeting, and one Doolittle bid off the collectorship, in the absence of Austin, and because Austin was absent, and, as Doolittle said afterwards during the said meeting, for Austin.

“ There was evidence tending to show that Austin, acting as collector, collected a considerable portion of the taxes committed to him for collection ; and that he did not account for or pay over to the proper authorities, upon demand, a part of what he had collected.

“ This was, in substance, the plaintiffs’ case ; and when it was in, the defendants moved for a nonsuit, which motion the court overruled, and the defendants excepted.

“ Evidence was introduced upon both sides, upon the question whether any seals were affixed to the bond at the time of its execution. Cyrus S. Plank, called by the plaintiffs, testified that he drafted the bond in suit from the form used the previous year, leaving the names blank, in his store, which was also the place of business of the town treasurer ; that, after drafting it, he folded it up and left it upon the desk ; and that he thought he did not put any seals upon it. The plaintiffs’ counsel then offered to show that seals of the peculiar character of those upon the bond were, at that time, in said office ; and it

was allowed, against the defendants' objection and exception; and the witness testified that he had seen and used such seals there, but he was unable to say whether or not any such seals were in the office at the time of the drafting.

"The jury found for the plaintiffs, and the defendants alleged exceptions."

J. Price, for the defendants. 1. Austin was not chosen collector of taxes of Great Barrington for 1855; but Doolittle was, and had no power to transfer the office to Austin. *Sprague v. Bailey*, 19 Pick. 436. *Alvord v. Collin*, 20 Pick. 418. *Kepp v. Wiggett*, 10 C. B. 35.

2. The court erred in admitting the testimony of Plank, relating to the keeping in his store of seals like those upon this bond.

H. L. Dawes, (*I. Sumner* with him,) for the plaintiffs.

DEWEY, J. 1. Waiving the objection arising upon the form in which this case is brought before us by exceptions to the refusal of the presiding judge to order a nonsuit, and considering the question as arising upon a prayer for instructions to the jury that, upon the evidence, the plaintiffs were not entitled to a verdict in their favor, the court are of opinion that the action may be maintained, and that the jury properly returned a verdict in favor of the plaintiffs. Upon proper proof of the execution of this bond by the defendants, the recitals therein contained would be quite sufficient to estop the defendant from denying that Austin was such collector, in a suit seeking only to recover of the defendant the moneys he had received as such collector, by virtue of tax lists committed to him by the assessors to collect. There was evidence tending to show that Austin acted as collector, and collected a portion of the taxes committed to him for collection; and for this amount he may be properly charged, so far as he has failed to pay over the same. The town records were not introduced by either party, and no competent evidence offered that should affect the case, if we give no higher effect to the recitals in the bond than *prima facie* evidence that Austin was the collector of taxes. In any aspect of the question, we see no ground for exceptions for insufficiency of proof to

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show that Austin was liable to be charged as collector for the moneys which he thus received on the tax list committed to him.

2. The other exception taken is to the ruling of the court as to the competency of certain evidence upon the question whether the instrument now offered as a bond had seals thereon at the time of its execution. The ruling objected to was, that the plaintiffs might show that seals of the peculiar character of those on this bond were in the office where this bond was drafted. Whether such ruling was right or wrong was immaterial, as the witness to whom the question was propounded was unable to testify to any such fact.

Exceptions overruled.

RICHMOND IRON WORKS vs. SAMUEL WOODRUFF.

Under a plea of nul disseisin and payment to a writ of entry to foreclose a mortgage, the defendant cannot deny his possession.

A judge's refusal to allow a defendant, who has pleaded nul disseisin and payment to a writ of entry to foreclose a mortgage, to amend at the trial by filing a disclaimer, is no ground of exception.

An agreement for the sale of all the wood standing on certain land, to be delivered on the purchaser's land and there measured, and to be paid for according to such measurement, vests the title in the wood in the purchaser upon the delivery on his land.

In a suit to foreclose a mortgage, which the defendant alleged had been paid, the plaintiff proved an agreement to change the appropriation of the payments, previously agreed to be applied on the mortgage debt, to another debt. *Held*, that the defendant might then prove that the agreement to change the appropriation was made after he had applied for the benefit of the insolvent laws, and therefore invalid.

WRIT OF ENTRY, dated April 20th 1854, to foreclose a mortgage, made to secure the payment of a promissory note, dated August 26th 1847, for \$432 and interest. Plea, nul disseisin, and payment. The case was referred to an auditor, who made the following report thereof:

The plaintiff introduced the note, which bore no indorsement upon it, and the execution of which was admitted.

The defendant then introduced an offer in writing, dated August 26th 1847, made by him to Samuel Gates, as the plaintiffs' agent, and by him accepted, to sell him all the wood and timber standing on certain land in West Stockbridge, "estimated at four hundred cords, more or less," and to deliver the whole of it on the plaintiffs' furnace bank in Richmond, within one year; "the wood to be cut and ranked up on the said bank as common cord wood four feet in length and measured there;" charging a certain sum "for each solid cord so delivered; on the receipt of each hundred cords, measurement is to be determined or verified, and payment to be made by indorsement of the amount on" the mortgage note, "or to cancel in part" the mortgage; with a stipulation that, if the defendant should fail to deliver the wood within the specified time, the plaintiffs should have the right to enter upon the premises and take the wood, and deduct the expenses from the price stipulated.

Gates testified that some time before the defendant's land was sold by his assignee in insolvency — but whether before or after the defendant went into insolvency, he could not say — the defendant requested him to credit the wood drawn by him on book account instead of on the mortgage; and it was so credited. The defendant filed his petition for the benefit of the insolvent land on the 2d of August 1851, and duly obtained a certificate of discharge.

The defendant proved by the plaintiffs' books credits of more than three hundred cords of wood in April 1849, at prices corresponding to those stipulated, and amounting in all to \$757.95; and the auditor, upon all the evidence introduced, was of opinion that the plaintiff rightfully appropriated the credits to the defendant on account of the wood, in payment of the plaintiffs' book account; and found the amount due to the plaintiffs to be \$654.94.

A trial was had in the court of common pleas at February term 1857, before *Aiken*, J., who signed this bill of exceptions:

"The plaintiff offered evidence tending to prove the execution of the mortgage and of the note mentioned in the condition thereof; and the report of the auditor.

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"The defendant then offered to show that, at the time the action was brought, he was not in possession of the premises and had no interest therein; but the judge ruled that, under the pleadings, the evidence was not admissible.

"The defendant then moved for leave to file an amended plea disclaiming all right, title and interest in the premises; but the judge overruled the motion.

"The defendant then read in evidence the writing referred to in the auditor's report, and contended that, as soon as the defendant delivered wood mentioned in said writing, upon the plaintiffs' furnace bank, sufficient to pay said note, it was a payment thereof and discharged the mortgage.

"The defendant called Cyrus H. Woodruff as a witness, and asked him the times of delivery of the wood, for the purpose of showing that the agreement referred to by Gates was after insolvent proceedings had been instituted. The plaintiff objected, and the objection was sustained.

"The jury were instructed that, by the agreement, the delivery of each load of wood would not operate as a payment as the same was delivered, without some further act; that if there was a performance of the acts specified in said writing, so that nothing remained to be done but to indorse the wood on the note, such performance, although no indorsement actually was made, would operate as payment of the note, and the plaintiff could not recover; but that the parties had the power and the right, at any time before the wood so operated as payment, to change their agreement and apply it in payment of the account; and that if they did make a different arrangement, and agreed that said wood should be applied on the plaintiffs' account against the defendant, and it was applied accordingly, a verdict should be rendered for the plaintiffs.

"The jury returned a verdict for the plaintiffs; and to the foregoing rulings the defendant excepts."

J. E. Field, for the defendant. 1. The evidence offered by the defendant should have been received under the general issues pleaded. *St.* 1836, c. 273, § 1. *Churchill v. Loring*, 19 Pick. 466.

2. If the defendant had mistaken his plea, the amendment should have been allowed. *St.* 1852, c. 312, § 32.

3. The testimony offered, tending to show that at the time of the alleged change of appropriation the defendant was in insolvency, should have been received.

H. L. Dawes, (*I. Sumner* with him,) for the plaintiffs. 1. The plea of nul disseisin admits, upon the record, that the defendant is tenant of the freehold, and estops him to prove the contrary. *Kelleran v. Brown*, 4 Mass. 443. *Pray v. Peirce*, 7 Mass. 384. *Higbee v. Rice*, 5 Mass. 344. *Stevens v. Winship*, 1 Pick. 317.

2. The amendment offered was entirely within the discretion of the court. *Rev. Sts. c. 100*, § 22. *St.* 1852, c. 312, § 32. *Haynes v. Morgan*, 3 Mass. 208. *Thatcher v. Miller*, 13 Mass. 270. And therefore not matter of exception. *Reynard v. Brecknell*, 4 Pick. 302.

3. The instructions to the jury in reference to the contract were sufficiently favorable to the defendant. Until the contract was entirely fulfilled on the part of the defendant, he cannot claim the benefit of its fulfilment. The title to the wood had not passed to the plaintiffs. *Chit. Con.* (8th Amer. ed.) 376, 377. *Ward v. Shaw*, 7 Wend. 404. *Crawford v. Smith*, 7 Dana, 61. Until the contract was performed, the parties might rescind or modify it as they pleased. *Johnson v. Reed*, 9 Mass. 84.

4. The testimony of Cyrus H. Woodruff was immaterial. If the defendant made with the plaintiffs the agreement that the wood should be appropriated in payment of the account, he is bound by that agreement. He cannot set up that he has done this in fraud of his own creditors. No one but his assignee could call the transaction in question. If it occurred after the commencement of the insolvent proceedings, it is possible the assignee might deprive the plaintiffs of the benefit of the wood. But inasmuch as the defendant could not himself do this thing, it became as to him an immaterial question, whether it was before or after proceedings in insolvency were commenced; and the testimony was rightly rejected. *Drinkwater v. Drinkwater*, 4 Mass. 354. *Clapp v. Tirrell*, 20 Pick. 247.

THOMAS, J. 1. The evidence offered to show that when the action was brought the tenant was not in possession was rightly excluded. Under the pleadings the question was not open. The tenant's plea of nul disseisin admitted that he was tenant of the freehold, and there was no specification to qualify the effect of this plea.

2. The question of amendment was addressed to the discretion of the court, and is not the subject of exception. And, more than that, we think the discretion was properly used.

3. The evidence to show that the agreement to have the wood appropriated to the payment of the book account was made after proceedings in insolvency were instituted should have been received. Under the contract the wood had been delivered. It became the property of the plaintiffs upon such delivery. Nothing remained to be done but the measurement and computation to ascertain the amount of payment. Indeed, it would appear from the books that even the amount had been ascertained. It was not a contract for the sale of a part of an entire lot, and requiring severance and measurement before the title of the vendee could be perfected.

This contract or agreement for the appropriation of the price of the wood to the payment of the mortgage the parties might indeed modify or wholly rescind. The plaintiffs attempted to show such change of the contract by the testimony of Gates.

The evidence of Gates left it uncertain whether the agreement for a change in the appropriation of the price of the wood was before or after the defendant's insolvency. It fixed no time for the agreement, though it left it probable that the time was subsequent to the insolvency. The defendant offered to show the true time. No judgment could be formed of the validity of such an agreement for a change of the written contract, until it was ascertained whether the agreement was made before the institution of proceedings in insolvency. After the defendant had been declared insolvent, he could not change the appropriation. His right in and power over the mortgage or the proceeds of the sale of the wood were gone. *Exceptions sustained.*

WILLIAM H. CRITTENDEN & others vs. HARBON ROGERS.

An unrecorded certificate of an entry to foreclose a mortgage, made before the Rev. Sts., in the presence of two witnesses, is competent evidence of the foreclosure, if supported by the testimony of the witnesses that after the entry certain papers were executed by the parties, and that their names upon the certificate are in their handwriting, and must have been written by them, although they have no recollection what the papers were, or that they signed any papers.

A quitclaim deed to one of two mortgagors, from a mortgagee who has foreclosed his mortgage, in consideration of the payment of a sum equal to the original mortgage debt, is not sufficient evidence of an opening of the foreclosure to revert the title in the mortgagors.

WRIT OF ENTRY by the heirs at law of Mary Alexander, wife of David Alexander, to recover land in New Marlborough. Plea, nul disseisin.

At the trial before *Bigelow, J.*, it appeared that the land once belonged to Mary Alexander in her right. The tenant put in evidence two joint mortgages from David and Mary Alexander to Daniel Williams; and offered evidence which tended to show that said Williams on the 9th of October 1834 entered upon the premises and took open and peaceable possession thereof, in presence of two witnesses, for condition broken and for the purpose of foreclosure, and continued in actual possession thereof until the 4th of October 1838. The two witnesses in whose presence the entry for foreclosure was alleged to have been made, testified "that, after the entry was made, and on the same day, they went with Daniel Williams and David Alexander, to the office of an attorney, where certain writings were made and executed by the parties; that they did not remember what said writings were, nor that they witnessed them." They were then shown a paper, dated October 9th 1834, certifying that Daniel Williams had that day entered upon the mortgaged premises, and that David and Mary Alexander had delivered peaceable possession thereof to him, for condition broken, and for the purpose of foreclosing this mortgage, and signed and sealed by David Alexander; to which was added, "Possession delivered and received on the day and year aforesaid in presence of us,"

with the names of the two witnesses. And they then testified that "their names thereto appended were in their handwriting, and must have been written by them, but they had no recollection of having signed the paper." The tenant then offered the paper in evidence; and it was admitted, against the demandants' objection.

It further appeared that on the 4th of October 1838 Daniel Williams released and conveyed the demanded premises to David Alexander alone; and he, on the 1st of December 1852, by a deed containing full covenants of warranty, conveyed the same to one of the demandants, who on the 12th of April 1853, by a deed containing full covenants of warranty, conveyed the same, his wife releasing her dower therein, to the tenant.

Upon this evidence the tenant contended that, if the mortgage was foreclosed by an entry on the 9th of October 1834, and a subsequent possession of upwards of three years, the whole title became vested in Daniel Williams, who, by his deed of October 1838, conveyed it to David Alexander, from whom, by mesne conveyance, it had become vested in the tenant.

The demandants called a witness to prove that, on the 1st of October 1838, when Williams conveyed to David Alexander, the latter paid to Williams the full amount of the debt for which the land had been originally mortgaged, and that this was the consideration of the release then made by Williams to him. The demandants contended, on this evidence, that the right of the wife, Mary Alexander, was revived by this payment, and that the release to David Alexander did not convey the whole estate to him. But the judge ruled otherwise.

The question whether there was an entry and possession of the premises by the mortgagee, Daniel Williams, on the 9th of October 1834, duly made and continued for three years, according to the law as it then existed, was submitted to the jury with instructions to which no exception was taken; and they were directed, if they found such entry and possession, to return a verdict for the tenant. The jury found for the tenant, and the case was reserved for the consideration of the full court.

J. E. Field & B. Palmer, for the demandant. 1. The certificate

of foreclosure should not have been permitted to go to the jury. No such certificate was required by law at that time. The paper was not so identified by the witnesses as to bring it within the case of *Smith v. Johns*, 3 Gray, 517; for it was not written by them; they had no recollection of signing it, or any other paper; and it was not brought home to the knowledge of Mrs. Alexander.

2. If the foreclosure was sufficient, the legal effect of the payment of the mortgage debt by one of the mortgagors, and taking a quitclaim deed from the mortgagee, more than three years afterwards, was to revest in the mortgagors the same title which they had at the time of making the mortgage. *Kinley v. Hill*, 4 W. & S. 426. *Perkins v. Dibble*, 10 Ohio, 433.

I. Sumner, for the tenant.

SHAW, C. J. 1. The court are of opinion that the directions were right, and that the verdict must stand. The certificate of entry to foreclose, verified as it was by the witnesses, was competent. If no certificate was at that time required to be made and signed by the witnesses, yet there was nothing to prohibit the proof being made in this form. The fact of entry constituted the commencement of the time of foreclosure, by statute, to be proved by any competent evidence. Now, when a witness, purporting to be an attesting witness, admits his handwriting to be genuine, and knows he would not have put it there but to verify the facts stated; this is evidence competent to go to the jury, and, if uncontrolled by other evidence, sufficient to warrant them in finding the fact of entry proved.

2. This being a good entry to foreclose, the foreclosure became complete and the estate absolute in the mortgagee at the expiration of three years, and enabled him to give a good title in fee to the purchaser. The fact that this was given to one of those, who, before foreclosure, had a right to redeem, and for the sum to which the mortgage would have amounted, of itself affords no presumption that this transaction was a redemption, which would let in his former joint owner of the right of redemption; and cannot, without other proof, control the character and legal effect of the deed. The privity between this purchaser

and the other owner of the right of redemption had ceased by the actual foreclosure. And the grantee, taking a deed to his own use, had as good a right so to purchase as a stranger.

Judgment on the verdict.

COMMONWEALTH vs. INHABITANTS OF DRACUT.

No action lies by the Commonwealth against the town of a pauper's settlement for the expenses of his support at one of the state almshouses before the *St.* of 1855, c. 445, took effect.

The Commonwealth cannot recover of a town, under *St.* 1855, c. 445, § 4, the expenses of supporting a pauper at a state almshouse more than three months next before notice thereof to the town.

The *St.* of 1855, c. 445, giving a remedy to the Commonwealth against towns for the support of "any pauper who shall become an inmate of the state almshouses," includes the support, since that statute took effect, of paupers who became inmates of one of the "state almshouses before.

All objections to the sufficiency of a notice to charge a town with the support of a pauper are waived by returning an answer denying all liability on the ground that the pauper has no settlement in the town.

Misjoinder of causes of action in the same count can be raised by demurrer only.

The omission of an allegation of notice can be availed of by demurrer only.

ACTION OF CONTRACT to recover expenses incurred for the support, as paupers, of the wife and three children of Henry Goodhue, who was admitted to have had his settlement in Dracut. Writ dated April 8th 1856.

The declaration contained four counts, each of which alleged that one of said four persons was a pauper, having his or her legal settlement in Dracut, "and became an inmate of the state almshouses at Monson and at Tewksbury in said commonwealth, in distress, and in need of immediate relief; and the plaintiff provided for the immediate comfort and relief of said pauper at said almshouses, of all which the defendants had due notice, and thereby became liable to pay the expenses incurred by the plaintiff for said pauper at said almshouses."

The answer declared the defendants' ignorance whether these persons were paupers and in distress and in need of immediate

relief, and became inmates of said state almshouses, and whether the Commonwealth provided for their immediate comfort and relief at said almshouses; and denied their settlement in Dracut; and denied that the defendants ever had notice that they were paupers, or were in distress and in need of immediate relief, or were ever inmates of said almshouses or either of them, or that the Commonwealth provided for their comfort and relief; and denied that the defendants ever owed or became liable to pay the expenses, or any part thereof, incurred by the Commonwealth.

At the trial in this court, at May term 1857, before *Metcalf, J.*, the main fact in dispute was the marriage of Henry Goodhue to his alleged wife, which was submitted to the jury, who found in favor of the marriage.

The Commonwealth claimed the right to recover the expenses incurred before the 21st of May 1855 at common law; and those incurred since, under the *St.* of 1855, c. 445.

The only notice that was proved was a notice signed "by order of the inspectors of the state pauper school at Monson," by their clerk, dated September 27th 1855, and addressed to the overseers of the poor of Dracut, informing them that these paupers, who had their settlement in Dracut, had fallen into distress, and were now inmates of the state almshouse at Monson, where they were supported at the expense of the Commonwealth; requesting them to remove the paupers; and notifying them that until such removal the town of Dracut would be held liable for the support of the paupers. This notice was received on the 29th of September, and an answer returned, denying all liability, upon the ground that the paupers had not their settlement in Dracut. The defendants objected, at the trial, to the efficiency of the notice.

They also objected to the sufficiency of the declaration, because claims for expenses at two distinct almshouses were joined in the same count; because claims under the statute and claims at common law were joined in the same count; and because there was no averment that notice was given within three months after the expenditures.

The case was reserved for the determination of the full court upon a report, the substance of which is stated above.

H. L. Dawes, for the Commonwealth.

I. Sumner, for the defendants.

METCALF, J. If the defendants are liable to the Commonwealth in this action, it is solely by virtue of *St.* 1855, c. 445. They are not liable by the common law, nor by any previous statute. The provision of the fourth section of said *St.* of 1855 is this: "If any pauper, having a legal settlement in any city or town in this commonwealth, shall become an inmate of the state almshouses, such city or town shall be liable to the Commonwealth for the expense incurred for such pauper, at such almshouse, in like manner as one town is liable to another town in like cases; and the same measures shall be adopted by the inspectors of the state almshouses respectively, in regard to notifying towns so liable, the removal of such pauper, and the recovery from towns of expenses incurred for such pauper at the almshouses, as are prescribed for towns in like cases." This statute took effect on the 21st of May 1855, and its provisions are wholly prospective. The defendants are liable, therefore, only for expense incurred in support of the paupers after the passing of the statute, and within three months next before notice given to them, by the inspectors of the almshouse, that the paupers were there supported. *Rev. Sts. c. 46, § 13. Cum- mington v. Wareham*, 9 Cush. 585. That notice was given on the 27th of September 1855, and made the defendants liable for the expense incurred for the paupers, from June 27th 1855 to the date of the writ; but not for the expense previously incurred.

The section of the statute, on which this action is founded, mentions only such paupers as "shall become" inmates of state almshouses; and it has been suggested, but not urged, in behalf of the defendants, that the action cannot be maintained, because these paupers were inmates of an almshouse at the time when the statute was passed. But this suggestion is readily answered by the long established rule of construing statutes according to the manifest intent of the legislature, though apt words to express that intent may not be used, or though such construction

may not accord with the letter of the statute. Dwarris on Statutes, c. 12. Now the intention of the legislature manifestly was, to relieve the Commonwealth from the burden of supporting town paupers in the state almshouses, which were established for the support of state paupers only. It was found that paupers who had a settlement in the Commonwealth were sent to these almshouses; and it was the purpose of the legislature, by the statute in question, to give to the Commonwealth such remedy against the towns where such paupers had their settlement, as a town where they had not a settlement, but which had supported them, would have. It was an evil already existing, which the statute was meant to remedy, and not merely an evil that was anticipated. For the past expense of supporting town paupers, the legislature did not (probably could not, in cases where there was no fraud) demand an indemnity from the towns; but for the expense of their support after the passing of the statute, the means of indemnity were provided, as well for those paupers who were already inmates of state almshouses, as for those that afterwards should become such. The words "shall become an inmate" must have the meaning of "shall be an inmate." So the words "inmate of the state almshouses" must have the meaning of "inmate of a state almshouse;" otherwise, it would be necessary that a town pauper should be an inmate of more than one state almshouse before the Commonwealth could recover an indemnity from the town in which he had a settlement.

A question was raised by the defendants as to the sufficiency of the notice received from the inspectors of the almshouse. We have not considered this question; being of opinion that all objections to the notice were waived by the answer thereto, which was returned by the defendants. *Northfield v. Taunton*, 4 Met. 433. *York v. Penobscot*, 2 Greenl. 1.

Nor have we considered the objections to the declaration; because the defendants did not demur to it, but answered to the merits of the action. *Judgment for the Commonwealth.*

COMMONWEALTH *vs.* MORRIS LAHY.SAME *vs.* SAME.

The rule established by *St.* 1844, c. 102, that, in all prosecutions for selling spirituous liquors without license, the burden of proving a license shall be on the defendant, obliges any person prosecuted as a common seller of intoxicating liquors under *St.* 1855, c. 215, § 15, to prove any authority on which he relies in his defence. But it does not apply to an indictment on *St.* 1855, c. 405, for a nuisance by keeping a building used for the unlawful sale and unlawful keeping of intoxicating liquors.

A verdict of guilty upon an indictment on *St.* 1855, c. 405, for a nuisance by keeping a building used for the unlawful sale and unlawful keeping of intoxicating liquors, upon which no judgment has been rendered, is no bar to an indictment for being a common seller of intoxicating liquors at the same time and place.

TWO INDICTMENTS, found and tried at July term 1857 of the court of common pleas, held by *Sanger, J.*

The *first* was on the *St.* of 1855, c. 405, § 1, for a nuisance by keeping a shop in Lee, used as a house of ill fame, resorted to for prostitution and lewdness and for illegal gaming, and used for the illegal sale and illegal keeping of intoxicating liquors, from the 1st of July 1856 to the finding of the indictment.

At the trial, the Commonwealth relied only upon evidence tending to show that the building described in the indictment was used for the unlawful sale and keeping of intoxicating liquors; but there was no evidence that the defendant was not authorized to make the sales. The judge instructed the jury "that, as regarded the illegal sales, it was not necessary for the Commonwealth to show that the defendant was unauthorized to make the sales, but that it was for the defendant to show a license or authority to make such sales." The jury returned a verdict of guilty, and the defendant alleged exceptions.

The *second* indictment was on *St.* 1855, c. 215, § 17, for being a common seller of spirituous and intoxicating liquors in Lee, from the 1st of August 1856 to the day of the finding of the indictment. The defendant pleaded in abatement the pendency of the first indictment. But the plea was overruled.

At the trial, the defendant pleaded in bar his conviction upon that indictment, and objected to the introduction of any evidence

which was used on the trial of that indictment. But the objection was overruled.

The district attorney introduced no evidence to show that the sales were not authorized by law; and the judge instructed the jury "that, if they were satisfied the sales were made, they should return a verdict of guilty; and that it was incumbent upon the defendant to show that they were authorized." A verdict of guilty was returned, and the defendant alleged exceptions.

J. E. Field, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

SHAW, C. J. In general, the burden of proof is on the Commonwealth to prove every substantive fact of a criminal charge, even where it requires proof of a negative. And this rule was affirmed by this court, and applied to the case of selling liquors without license, in *Commonwealth v. Thurlow*, 24 Pick. 380. The legislature interposed and passed an act placing upon the defendant the burden of proving a license, "in all prosecutions for selling spirituous or fermented liquors without license." *St.* 1844, c. 102. But that statute is expressly limited to prosecutions for selling liquors, and the court see no reason for departing from the general rule, and applying this statute exception to a distinct class of offences. Upon the trial of the indictment for a nuisance, therefore, the instruction was wrong, and there must be a

New trial in the court of common pleas.

In the second case, the plea in abatement was rightly overruled. The pendency of another indictment, even if for the same offence, is not ground of abatement.

The judge rightly ruled that the burden of proving authority was upon the defendant. The rule established by the legislature by the *St.* of 1844, has been uniformly applied by the court to all prosecutions for selling spirituous or intoxicating liquors without license or authority of law; as, for instance, to prosecutions under the *Sts.* of 1850, c. 238, and 1852, c. 322. *Commonwealth v. Kelly*, 10 Cush. 69. *Commonwealth v. Tuttle*, 12 Cush. 503.

The conviction in the first case was nothing but a verdict, and was therefore rightly held no bar to the second indictment. And that verdict having now been set aside, there is no reason why this indictment should not be maintained.

We are not called upon to decide whether the conviction of being a common seller in this case will be a bar to an indictment upon the same evidence, for a common nuisance.

Exceptions overruled.



COMMONWEALTH vs. JOHN BYCE.

The allowance of an improper and irrelevant course of argument is no ground of exception, without showing that the jury were erroneously instructed as to the weight to be given to it.

The *St.* of 1852, c. 4, conferring on justices of the peace jurisdiction of larceny of property in a building, where the amount stolen is small, has not made it necessary, on the trial of an indictment in the court of common pleas, to prove that the property stolen exceeded that value.

INDICTMENT for larceny, in a building, of twelve bank bills, particularly described, amounting in all to forty dollars in amount and in value.

At the trial in the court of common pleas, before *Sanger, J.*, the defendant's counsel argued that a witness who had testified to the larceny of the bills, and to the identity of the bills stolen with those soon after found in the defendant's possession, might well be, and was, mistaken in his testimony. The district attorney, in closing the case, was arguing to the jury that they must find the defendant guilty, or else find substantially that the witness had committed perjury; when he was interrupted by the defendant's counsel, who urged that this was not a proper or legitimate argument.

The district attorney also argued to the jury, that the fact (which was so) that the defendant did not show or offer to show how or whence he obtained the bills found in his possession was a circumstance from which the jury might infer guilt; and further, that the fact (which was so) that the defendant offered

no evidence of previous good character was a circumstance which should weigh with them against the defendant. The defendant's counsel objected to this course of argument also as improper.

The judge, in each instance, permitted the district attorney to pursue such course of argument; but, in summing up to the jury, instructed them how far these considerations and arguments should properly influence them; and to these instructions no exceptions were taken.

The judge also instructed the jury that if they were satisfied, beyond a reasonable doubt, that the defendant committed the larceny of any part of the property described in the indictment, in the building described therein, they could find the defendant guilty, without finding specially what part was so stolen. The jury returned a verdict of guilty, and the defendant alleged exceptions.

J. Price, for the defendant. 1. The course of argument pursued by the district attorney was improper and should not have been permitted. *People v. Bodine*, 1 Denio, 314.

2. The jury should have been instructed to ascertain what portion of the property the defendant stole; for the degree of the offence and of the punishment depends on the amount stolen. By *St.* 1851, *c.* 156, § 4, larceny in any building is to be punished by imprisonment in the state prison not more than five years, or in the house of correction or county jail not more than three years, or by fine not exceeding five hundred dollars. But by *St.* 1852, *c.* 4, police courts and justices of the peace may take jurisdiction of cases where the property stolen does not exceed ten dollars in value, and punish by fine not exceeding twenty dollars, or by imprisonment in the county jail or house of correction not exceeding one year.

J. H. Clifford, (Attorney General,) for the Commonwealth.

BY THE COURT. 1. The allowance of an irrelevant and improper course of argument is not matter of exception, if the jury are properly instructed as to the weight to which such arguments are entitled. And we must presume that the instructions on this subject were correct, as they were not excepted to.

2. The gist of this offence is stealing any property in a building. On the trial of an indictment for this offence, the amount of property stolen is immaterial, except so far as it may influence the discretion of the judge in passing sentence. The statute undertaking to confer jurisdiction on justices of the peace and police courts, where the amount of property stolen is small, does not affect the proceedings in a higher court. A similar decision was made by this court as to the analogous case of larceny from the person, in *Commonwealth v. Nolan*, 5 Cush. 288.
Exceptions overruled.

COMMONWEALTH vs. MORGAN FARRELL.

A complaint duly charging an offence, certified in the usual form by the magistrate to whom it was presented to have been sworn to by the complainant, cannot be affected by evidence that there was no further examination of the complainant on oath before issuing the warrant.

COMPLAINT to the police court of Adams for an unlawful sale of intoxicating liquor, in violation of *St.* 1855, c. 215, § 15. Trial in the court of common pleas, at July term 1857, before *Sanger*, J., who signed this bill of exceptions:

"It appeared that the complaint was issued by the standing justice of said police court, without any examination under oath of the complainant previous to the issuing of the same, in relation to the fact and the grounds upon which the charge was preferred. The complaint was sworn to by the complainant in the usual manner. The defendant's counsel asked the presiding judge to rule that such examination should have been made, as preliminary to the receiving of the complaint, and that the said complaint be quashed for such informality. The court declined so to rule, and, for the purposes of the trial, ruled that the complaint was sufficient, and overruled the said motion. To the said ruling the defendant excepts."

C. N. Emerson, for the defendant. The Rev. Sts. c. 135, § 2,

expressly require that the magistrate "shall examine on oath the complainant," "and shall reduce the complaint to writing, and shall cause the same to be subscribed by the complainant." And see *D. Davis's Justice*, c. 1. Yet no such examination was had in this case.

J. H. Clifford, (Attorney General,) for the Commonwealth.

By THE COURT. Where a complaint duly charging an offence is presented in writing to a magistrate, and he administers the oath to the complainant, and certifies it in the usual form, this is conclusive evidence of a compliance with the provisions of the Rev. Sts. c. 135, § 2. *Exceptions overruled.*

COMMONWEALTH vs. PIERCE O'CONNELL.

The mere grant of "exclusive jurisdiction" to a police court, by the statutes of the Commonwealth, over certain offences, does not exclude the authority of justices of the peace to receive complaints and issue warrants returnable before that court against persons charged with those offences.

COMPLAINT to a justice of the peace for an unlawful sale of intoxicating liquor in Williamstown, in violation of *St. 1855, c. 215, § 15*. The justice issued a warrant, returnable before the police court of Williamstown; and the defendant, being convicted in that court, appealed to the court of common pleas, and at July term 1857 moved that the proceedings be quashed, because they were commenced before a justice of the peace, notwithstanding the provision of *St. 1855, c. 83, § 2*, that original and exclusive jurisdiction of such offences should belong to the police court. *Sanger, J.* overruled the motion, and the defendant alleged exceptions.

C. N. Emerson, for the defendant.

J. H. Clifford, (Attorney General,) for the Commonwealth.

This case was decided at Boston in June 1858.

METCALF, J. The act establishing a police court in the town of Williamstown (*St.* 1855, c. 83, § 2,) provides that "the said court shall have original and exclusive jurisdiction over all crimes, offences and misdemeanors committed within said town, whereof justices of the peace now have or may have jurisdiction." And the question in the present case is, whether this provision excludes the authority of a justice of the peace to receive a complaint, and issue a warrant returnable before that court. This depends on the legal meaning and effect of the two words "exclusive jurisdiction"; for the word "original" adds nothing to the word "exclusive;" inasmuch as exclusive jurisdiction is necessarily original, although original jurisdiction is not necessarily exclusive.

We have deemed it necessary to the decision of the question before us, to examine the whole legislation respecting police courts; and the substance of it is as follows:

All the acts establishing police courts, previously to *St.* 1849, c. 127, expressly recognized the authority of justices of the peace to issue warrants for offences cognizable by those courts, and directed that the warrants issued by them should be returnable to those courts. *Sts.* 1821, c. 109; 1831, c. 70; 1833, cc. 64, 192; 1834, c. 33; establishing police courts in Boston, Salem, Lowell, Newburyport and New Bedford, and incorporated into the Rev. *Sts.* c. 87; *Sts.* 1834, c. 97, 1848, c. 260, and 1849, c. 86, establishing such courts in Taunton, Lawrence and Lynn. The first statute, we believe, which gave to a police court, in express terms, "exclusive jurisdiction" over certain offences, without any provision as to warrants to be issued by justices of the peace, was that of 1849, c. 127, above referred to, establishing, for the second time, a police court in Taunton. Since the passing of that statute, several others, including that which is now before us, have been passed in similar terms. *Sts.* 1854, cc. 34, 60, 72, 249, 277, 312; 1855, cc. 153, 463; establishing police courts in Haverhill, Milford, Blackstone, Roxbury, Adams, Plymouth and Chicopee. But the *Sts.* of 1852, cc. 94, 304, and 1855, c. 26, establishing such courts in Springfield, Fall River and Chelsea, are in the terms of the earlier statutes. In *Sts.*

1850, *cc.* 58, 310, and 1855, *c.* 312, by which police courts were established in Springfield, Pittsfield and Lee, and exclusive jurisdiction was given to them over certain offences, justices of the peace were forbidden to issue warrants. This prohibition would hardly have been inserted, unless it was the sense of the legislature, that the mere grant of exclusive jurisdiction to those courts would not exclude the authority of justices of the peace to issue warrants.

The legislation respecting the police court in Blackstone, by which, after exclusive jurisdiction of certain offences had been given to that court, without any provision as to the issuing of warrants, an additional act was passed, authorizing justices of the peace to issue warrants returnable before that court, must be taken as an instance of extreme caution to exclude a wrong inference, and cannot control the meaning as ascertained from all other legislation on this subject. *Sts.* 1854, *cc.* 72, 345.

The legislature have repeatedly so used the words "exclusive jurisdiction," in acts establishing police courts, as to render it certain that they could not have meant exclusive authority to issue warrants returnable to those courts. Thus, the *St.* of 1834, *c.* 33, establishing a police court in New Bedford, contained this provision: "All writs and warrants issued by said court, or by any justice of the peace within said town of New Bedford, in all matters or cases whereof said court by this act has exclusive jurisdiction, shall be made returnable and shall be returned before said court." A provision, in like terms, was contained in the acts establishing police courts in Taunton and in Worcester. *Sts.* 1834, *c.* 97, § 2; 1848, *c.* 32, § 25. The *St.* of 1854, *c.* 335, which established a police court in Cambridge, contained a grant of exclusive jurisdiction in precisely the same terms as was granted to the police court in Williamstown by the statute now under consideration. Yet it contained this direction: "All warrants issued by the said court, or by any justice of the peace in Cambridge, in any criminal suit or prosecution, shall be made returnable before the said court." So of *St.* 1857, *c.* 112, establishing a police court in Framingham, and *St.* 1858, *c.* 84, passed whilst this case was under advisement, establishing a new police court in Taunton.

In *Commonwealth v. Pindar*, 11 Met. 539, it was decided that the *St.* of 1833, c. 33, and the Rev. *Sta. c.* 87, did not confer on the police court in Lowell jurisdiction of offences committed in that place, exclusive of all the justices of the peace in Middlesex, but exclusive only of justices of the peace in Lowell, who might nevertheless, by those statutes, issue warrants returnable to that court. After that decision, it was enacted, by *St.* 1848, c. 331, § 4, that the exclusive jurisdiction of the crimes and offences, committed within the district of Lowell, should be vested in the police court in Lowell. Thereupon it was contended that justices of the peace could no longer issue warrants returnable before that court. But it was decided otherwise, and the *St.* of 1848 was held not to have taken away from justices the authority which they before had. *Commonwealth v. Roark*, 8 Cush. 210. The defendant's counsel, however, relies on a remark of the court in that case, that if the fourth section of *St.* 1848 had stood alone, the court would have inclined to the opinion that the original process in that case was unauthorized. And perhaps the court, in the present case, would have been of opinion that, if the second section of the statute establishing a police court in Williamstown (quoted at the beginning of this opinion) had stood alone, the defendant's motion to quash this indictment should prevail. But it does not stand alone. It must be taken in connection with various unsystematic statutes concerning police courts, extending over a period of thirty five years, from which we are to infer what the legislature mean, or at least what they do not mean, in a given case, by the words "exclusive jurisdiction." And after an examination and comparison of those statutes, we have come to this conclusion :

That when "exclusive jurisdiction" is given to a police court over certain enumerated or described offences, the authority of justices of the peace to receive complaints, and to issue warrants returnable before that court, against persons charged with those offences, is not thereby excluded, unless there is, in the act establishing the court, or in a subsequent act, a superadded provision, by which such authority is excluded, either expressly or by necessary implication ; and that the grant to such court of

"exclusive jurisdiction," taken by itself alone, is a grant only of exclusive authority to try, or to examine and hold for trial, those who are charged with the offences of which such court has cognizance.

As authority is expressly given to a justice of the peace, in general terms, by the Rev. Sts. c. 135, to issue warrants returnable before some other justice or court, we are of opinion that such authority can be taken away, in a particular case, only by an explicit enactment. See *Commonwealth v. Wilcox*, 1 Cush. 503, 505.

Exceptions overruled.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTIES OF HAMPSHIRE, FRANKLIN AND HAMPDEN,
SEPTEMBER TERM 1857 AT NORTHAMPTON

PRESENT :

HON. LEMUEL SHAW, CHIEF JUSTICE.		
HON. CHARLES A. DEWEY,	}	JUSTICES.
HON. THERON METCALF,		
HON. GEORGE T. BIGELOW,		
HON. BENJAMIN F. THOMAS,		

COMMONWEALTH vs. ALEXANDER MAHAR.

An indictment for stealing in a "refreshment saloon" does not show that the larceny was in a building, and the defendant, upon conviction, can only be sentenced for a simple larceny.

INDICTMENT for larceny "in the refreshment saloon of Lewis B. Edwards." The defendant, being convicted in the court of common pleas, moved in arrest of judgment, and alleged exceptions to the overruling of that motion, but now waived his exceptions.

W. Allen, Jr., for the defendant, suggested a doubt whether the description in the indictment was sufficient to warrant a

sentence for larceny in a building, under *St. 1851, c. 156, § 4*, because a refreshment saloon might not be in any building, but might be in a vessel, or even in a mere tent.

D. W. Alvord, (District Attorney,) for the Commonwealth, argued that the term "refreshment saloon" was well understood as indicating a room in a building.

But THE COURT, on the ground that stealing from a refreshment saloon did not necessarily imply stealing from a building, ordered the *Defendant to be sentenced for a simple larceny*.

COMMONWEALTH vs. LEWIS HARRIS.

Under the statutes of the Commonwealth, a justice of the peace may bind over for trial in the court of common pleas a defendant charged with an offence of which he has jurisdiction concurrent with that court.

Upon a complaint made to a justice of the peace for an offence of which he had concurrent jurisdiction with the court of common pleas, the justice's record stated the complaint and warrant, the defendant's appearance and plea of not guilty, and that, after hearing witnesses, and fully understanding the defence, it was considered by the court that he was guilty of the offence so charged against him, and that he should therefore recognize for his appearance before the next court of common pleas. *Held*, that this was no bar to an indictment for the same offence.

INDICTMENT for larceny of goods under five dollars in value. Plea, that a complaint against the defendant for the same larceny of the same goods had been made to a justice of the peace having final jurisdiction thereof; that a warrant was issued thereon, on which the defendant was arrested, and arraigned before the justice, and afterwards "appeared before said justice, and was put upon his trial on said complaint and the issue thereon; and divers witnesses were sworn and examined; and said trial was fully, and in due form of law, then and there had and concluded, and the said Harris fully tried on said complaint, and was found and adjudged by the said justice to be guilty, and was then and there duly convicted of the offence charged against him in said complaint, and was thereupon sen-

tenced and ordered by said justice to recognize to the Commonwealth in the sum of one hundred dollars, with sufficient sureties in the like sum for his personal appearance before the then next term of the court of common pleas," &c.; and "that he then and there objected to the said sentence and order of said justice, and moved and demanded the said justice that he should sentence him the said Harris on said conviction according to law but the said justice refused so to do; and the said Harris, failing so to recognize as aforesaid, was, by order of the said justice, committed to the jail of said county, and performed the sentence or order of the said justice;" and that all these proceedings were regular, and had not since been reversed. The defendant annexed to his plea a copy of the record, which (except the complaint and warrant) is printed in the margin.*

* Hampshire, ss. At a justice's court holden before me the subscriber, a justice of the peace within and for said county, at my office in Northampton in said county, September 1st A. D. 1856. By virtue of the within warrant, the respondent is brought into court, and the within complaint is read to him, and being asked whether he is guilty or not guilty of the offence therein charged upon him, saith that he is not guilty. When, on motion of the complainant, this complaint was from thence continued to Tuesday the 2d day of September A. D. 1856, at 9 o'clock A. M., and the respondent is ordered to recognize to the Commonwealth with sureties in the sum of \$50 for his appearance to answer on this complaint as aforesaid, and recognized; at which last mentioned date, after hearing divers witnesses sworn to testify the whole truth in the matter, and fully understanding the defence of said respondent, it is considered by the court that he is guilty of the offence so charged against him.

It is therefore ordered by the court, that said respondent recognize to the Commonwealth in the sum of one hundred dollars, with sufficient sureties in the like sum, for the personal appearance of said respondent before the court of common pleas, to be holden at Northampton within and for said county on the third Monday of December next, then and there to answer to all such matters and things as shall be objected against him the said respondent on behalf of said Commonwealth, (but more especially to the within complaint,) and abide the order and sentence of said court thereon, and also for his personal appearance at any subsequent term of said court to which the same may be continued, if not previously surrendered and discharged, and so from term to term, until the final decree, sentence or order of said court thereon, and to abide such final sentence, order or decree of said court, and not depart without leave. And failing so to recognize thereon, as the law directs, was committed according to law.

S. WELLS, Justice of the Peace.

To this plea the district attorney demurred, and his demurrer was sustained by the court of common pleas. The defendant appealed to this court.

W. Allen, Jr., for the defendant. 1. A regular conviction of an offence by a justice of the peace, having jurisdiction, is a bar to a subsequent prosecution for the same offence. 1 Bishop on Crim. Law, §§ 649-651, 656-663, 666, 669. 3 Greenl. Ev. §§ 35, 37. *Commonwealth v. Cunningham*, 13 Mass. 245. *Commonwealth v. Roby*, 12 Pick. 496. *Commonwealth v. Tuck*, 20 Pick. 356.

2. The plea shows a conviction. A conviction is directly alleged, is consistent with the other allegations of the plea, and admitted by the demurrer.

3. The plea shows not only a conviction, but a judgment executed, which, though irregular, is a bar. *Commonwealth v. Goddard*, 13 Mass. 455. *Commonwealth v. Loud*, 3 Met. 328.

4. The jurisdiction of the justice, having first attached, became exclusive. *Smith v. M'Iver*, 9 Wheat. 532. *Shelby v. Bacon*, 10 How. 67. *Mallett v. Dexter*, 1 Curt. C. C. 178. Whart. Crim. Law, (4th ed.) § 521. Having once taken jurisdiction of the case, he had authority only to dispose of it finally; not to examine and hold for trial in the court of common pleas. Rev. Sts. c. 85, §§ 24-26; c. 126, §§ 17, 18; c. 135, § 25. *St.* 1852, c. 4.

The defendant cannot be in the custody of two courts at the same time. If the justice could hold for trial in the court of common pleas, he might practically impose a severer imprisonment, by commitment for want of bail, than that court could upon conviction; and an acquittal by the justice would not be a bar.

D. W. Alvord, (District Attorney,) for the Commonwealth.

This case was decided at September term 1858.

DEWEY, J. The question here raised is not the ordinary question that might arise between two courts of merely concurrent jurisdiction over the offence charged. In such case it is well settled that the court, be it the inferior or superior, which first takes jurisdiction of the case, is to proceed to hear the same

and render judgment therein; and such judgment will be a perfect bar to any subsequent prosecution in another court of concurrent jurisdiction.

Whether a sentence awarding punishment upon the finding of the guilt of the party is necessary to enable him to sustain a plea of *autrefois convict*, it is not necessary to decide, in the view we have taken of the present case. As to that question this court, in the case of *Commonwealth v. Roby*, 12 Pick. 510, waived expressing any opinion. Upon examining the authorities there relied upon to sustain the affirmative of that proposition, it will be found they do not seem to support it; but only to hold that a verdict, rendered upon a defective indictment which would not sustain a sentence, was no bar to a subsequent prosecution. 1 Chit. Crim. Law, 462. 2 Hale P. C. 255.

It would be necessary more distinctly to settle this point if the court here taking jurisdiction in the first instance had a mere concurrent jurisdiction with the court of common pleas of the offence charged. But the case before us is quite otherwise. Justices of the peace act in a twofold capacity in regard to criminal cases brought before them: the one, that of an examining magistrate preparatory to binding the party to answer before the court of common pleas for the offence charged, upon presentment to be made by the grand jury; the other capacity, that of a court competent to exercise final jurisdiction, or, in other words, a concurrent jurisdiction with the court of common pleas to try the case, subject only to an appeal, in which case a trial in the court of common pleas is had upon the original complaint. This twofold jurisdiction raises, in the present case, two inquiries:

1st. Can a justice of the peace act as such examining magistrate, with the power to hear evidence and order the defendant to recognize for his appearance at the court of common pleas, in those cases where, by statute, he has concurrent jurisdiction to hear and decide upon the guilt of the party, and to pass sentence thereon if he finds the party guilty?

2d. Do the proceedings in the present case appear to have

been those of an examining magistrate merely, or a trial in the ordinary mode of a court exercising final jurisdiction?

The first of these questions leads to an examination of the powers and duties of justices of the peace. By the early colonial statute of 1646, magistrates had authority given them to hear and determine certain small thefts, such as "robbing any orchard," "stealing wood from men's doors or yards." *Anc. Chart.* 57.

By *St.* 1692, jurisdiction was given to justices of the peace to hear and determine larcenies, "provided that the damage exceed not the sum of forty shillings." *Anc. Chart.* 238. By the same statute it was also enacted, that "every justice of the peace in the county where the offence is committed may cause to be stayed and arrested all affrayers, rioters, disturbers or breakers of the peace, and commit the offender to prison until he find sureties for the peace and good behavior; and may further punish the breach of the peace in any person that shall smite or strike another, by fine not exceeding twenty shillings, and require bond with sureties for the peace; or bind the offender over to answer it at the next sessions of the peace, as the nature or circumstances of the offence may be." *Anc. Chart.* 239, 240.

Such was the statute law until after the adoption of the Constitution, when, by the *St.* of 1783, c. 51, § 1, it was enacted that every justice of the peace within his county might "punish, by such fine as is by the statute law of the Commonwealth provided, all assaults and batteries that are not of a high and aggravated nature, and cause to be arrested all affrayers, rioters, disturbers and breakers of the peace, and bind them to appear at the next supreme judicial court or court of general sessions of the peace, at the discretion of the justice"; and should "examine into all homicides, murders, treasons and felonies committed in their counties, and commit to prison all persons guilty, or suspected to be guilty;" and "hold to bail all persons guilty, or suspected to be guilty, of lesser offences which are not cognizable by a justice of the peace."

The *St.* of 1784, c. 66, § 4, gave to justices of the peace,

authority to hear and determine cases of larceny, provided treble the value of the property did not exceed forty shillings; and to sentence by a fine not exceeding forty shillings, or imprisonment not more than twenty days. The higher courts had authority to inflict severer punishment for all larcenies, including those made cognizable by a justice.

The *St.* of 1794, *c.* 26, was a reënactment of the leading provisions of the *St.* of 1692, already cited, and had the same provision authorizing a justice of the peace to "punish the breach of the peace in any person that shall assault or strike another, by fine not exceeding twenty shillings; or bind the offender to appear and answer for his offence at the next court of general sessions of the peace, as the nature or circumstances of the case may require."

By *St.* 1804, *c.* 143, § 2, a concurrent jurisdiction with the higher courts was vested in justices of the peace when the value of the articles should not be alleged to exceed five dollars. By the *Rev. Sts. c.* 126, § 18, a like jurisdiction is given over simple larcenies, when the value of the goods is not alleged to exceed fifteen dollars, and in all cases of larcenies when the alleged value does not exceed five dollars; and by the *Rev. Sts. c.* 143, § 5, a concurrent authority with the higher courts to sentence to the house of correction when the property stolen does not exceed in value five dollars.

The power to cause an arrest, and to hold to answer before a higher tribunal, which had been conferred upon justices of the peace by previous legislation, was again reënacted in the *Rev. Sts.* In *c.* 85, § 26, it was provided that justices of the peace might cause to be arrested any persons found in their counties charged with any offence; and should "examine into all treasons, felonies, high crimes and misdemeanors, and commit, or bind over for trial, all persons who appear to be guilty thereof." Section 1 of *c.* 135 gives authority to justices of the peace to issue process for the arrest of persons charged with offences; and §§ 12-18 provide the mode of examination, and authorize a discharge of the party if the offence is not proved; but if it appears that an offence has been committed, and that there

is probable cause to believe the party guilty, he is to be committed, or bound over to appear at the next term of the court having cognizance of the offence.

Upon the question whether, under the Rev. Sts., a justice may, at his discretion, act as an examining magistrate, and bind over a party to appear before the higher court, when the offence charged is one of which he has a concurrent jurisdiction with such higher court, to hear and decide and award the punishment, a reference to our statutes will show that it is to some extent directly conferred. The crime of larceny in a building (a case supposed to have been omitted in c. 126 of the Rev. Sta.) was, by St. 1851, c. 156, § 4, made punishable by five years' confinement to hard labor in the state prison, and was thereby, by force of previous statutes, a case within the jurisdiction of the court of common pleas and municipal court exclusively. This offence thus made punishable by the statute just cited, was by the later St. of 1852, c. 4, also put within the jurisdiction of a justice, by providing that "justices of the peace may, in their discretion, take jurisdiction, and punish by fine not exceeding twenty dollars, or by imprisonment in the county jail or house of correction, not exceeding one year."

By the St. of 1855, c. 448, § 1, concurrent jurisdiction was given to the various police courts with the court of common pleas and municipal court of all larcenies where the value of the property stolen should not be alleged to exceed fifty dollars; and in § 3 it was further provided, that "said police courts may, at their discretion, decline to take final jurisdiction of any of the cases referred to in this act, and may send the same, as now, to the court of common pleas or municipal court for examination and trial." This act has been modified as to the extent of the punishment authorized thereby to be awarded by the police courts, by St. 1857, c. 157; but the same provision is reenacted as to the authority of the police courts to hear and finally determine such cases, or, in their discretion, to act merely as examining magistrates, and order the party to answer further before a higher court. We have in these statutes direct legislation that, in all larcenies under fifty dollars, the police

courts, who have heretofore had much the same jurisdiction as justices of the peace have in those towns where there are no police courts, may in these cases decline to take final jurisdiction, and may send the same to the higher court for further proceedings.

We apprehend these legislative enactments only gave effect to what had been previously the practice in justices' courts and also in the police courts, which had succeeded to the jurisdiction of justices of the peace, in the trial of cases in certain localities, namely: that, where a magistrate is clothed with the double power of examining magistrate, authorized to bind over the party to a higher tribunal for trial, he may, in cases where the higher court has a concurrent original jurisdiction, bind over the party, if the circumstances of the case seem to demand a higher punishment than he can inflict, although the justice has jurisdiction to determine the case and punish the offender by a penalty more limited than might be imposed by the higher tribunal. If this be not so held, then in all the cases where a concurrent jurisdiction is given to justices of the peace in cases of larceny, and no direct legislation gives a discretion to bind over to a higher court, the jurisdiction of the justice will practically be exclusive. The proceedings in cases of larceny, unlike those in many other offences, will, from the nature of the case, be commenced before a justice of the peace. They are cases where an immediate arrest is required, and such arrest will be by a complaint to a justice and a warrant thereon. The party being brought before the justice, the jurisdiction to try him would attach; and that would be his only duty. The consequence would be that, in all cases of simple larceny where the value of the property does not exceed fifteen dollars, and all larcenies where the value of the property does not exceed five dollars, if a warrant is issued for the arrest on a complaint made before a justice, the case must be tried before him, and the punishment can only be the limited one, however aggravating the circumstances. Larceny in a dwelling-house, although the property might be less than five dollars, might be highly aggravated in its character, and well deserving of punishment by

confinement in the state prison; but if the justice has no discretion to bind over the party to the higher court, no such punishment could be inflicted.

We have seen that the power to try and punish by a very limited punishment cases of larceny to a small amount, has, from the earliest period, been conferred upon justices of the peace; that, concurrently with this, the power has been vested in justices of the peace to receive complaints and issue warrants, to apprehend parties charged with larcenies of any goods, and to cause them to be brought before them, to hear the evidence, and to order them to be held to answer further before a higher court. The recent legislation as to police courts fully recognizes the discretionary authority in those tribunals, either to bind over to a higher court, or to try and sentence the crime of larceny in certain cases.

This, we think, had been the practice of justices of the peace before this period. In the opinion of the court the justice was well authorized, in the present case, after hearing the evidence, if he believed the party guilty, to order him to recognize to appear before the next court of common pleas, to answer for the offence, if in his opinion the attendant circumstances rendered it proper that the case should be finally determined and the sentence awarded by a court having power to inflict severer punishments than justices of the peace can award.

2. The only remaining inquiry is whether, in the present case, the justice did in fact exercise the power of an examining magistrate, hearing the evidence, and proceeding to hold the party to answer further before a higher court; or did he assume final jurisdiction to decide upon the guilt of the party, and proceed so far as to leave in him no other authority on the case than to pass sentence therein.

The plea of the defendant in its language strongly presents the case as of the latter kind, alleging that "the party was fully tried, was duly convicted of the offence," &c.; but all this must be taken to be qualified by the actual record of the justice, to which the plea refers, and a copy of which is by it brought before the court. The preliminary proceedings were certainly

much the same as on a final trial. Perhaps they would ordinarily be so. It certainly might be important to the party on trial to ascertain, before the evidence was closed, whether it was merely a preliminary examination, or a trial for the offence, with reference to the extent to which he would carry the defence.

In the present case, the order of the justice, as passed after hearing the case, negatives the idea of any trial beyond a preliminary examination having taken place before him. It was that the evidence satisfied him that the party was guilty, and, thus satisfied, he thought it a proper case for a higher tribunal to try, as his order was solely applicable to such a state of things, the order being "that he should recognize for his personal appearance at the next term of the court of common pleas to be holden at Northampton, then and there to answer to such matters as should be objected against him, and especially to said complaint, and to abide the order and sentence of the court thereon." In the opinion of the court upon the record, and the final disposition of this case, indicated thereby, the justice treated the same as a preliminary examination, and, in the exercise of his discretion, as he was lawfully authorized to do, bound over the party for further proceedings before the court of common pleas, upon any such indictment as might be found by the grand jury, to be tried in that court.

The result is therefore that the demurrer filed by the district attorney to the plea of the defendant is sustained, and the case is remitted to the court of common pleas for further proceedings.

We have considered this question without any reference to the fact that it was brought before us by appeal, no objection having been taken on that point. We apprehend no authority exists for such appeal; and the case should have been brought before us on exceptions, which exceptions, inasmuch as by the ruling of the court below the plea was held insufficient, could only be properly allowed after the case was fully tried in that court.

Demurrer sustained.

COMMONWEALTH vs. THOMAS TIMOTHY.

Any person is competent to testify that certain liquor was gin.

On the trial of an indictment for unlawfully keeping intoxicating liquor with intent to sell, the Commonwealth may introduce evidence that there were jugs in the defendant's house, which had recently contained liquor.

Liquors not actually intoxicating, but which the St. of 1855, c. 215, § 1, declares "shall be considered intoxicating within the meaning of this act," may be described as "intoxicating" in an indictment on that statute.

An indictment on St. 1855, c. 215, § 24, for unlawfully keeping "intoxicating liquors" with intent to sell, need not more particularly describe the liquors kept.

COMPLAINT on St. 1855, c. 215, § 24, averring that the defendant, on the 28th of July 1856, at Northampton, "did keep intoxicating liquors, with intent to sell the same in said commonwealth," he not being authorized under St. 1855, c. 215, or by any legal authority whatever, "against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided."

At the trial in the court of common pleas in Hampshire, before *Bishop, J.*, a witness for the Commonwealth testified that he, as an officer's assistant, went to the defendant's house to make a seizure; and being asked what they found at the defendant's house, testified that they found there what in his opinion was gin. The defendant objected that it was not shown that the witness knew or was capable to distinguish or tell what the liquor was. But the judge admitted the testimony.

The officer who made the seizure was also called as a witness, and asked if there were at the defendant's house other jugs than those containing liquors. The defendant objected. But the witness was allowed to answer the question, and testified that he did find there jugs which had no liquor in them, but which had had liquor in them recently.

The defendant, being found guilty, brought this case up by exceptions. He also moved in arrest of judgment, because the complaint did not set forth the offence fully, plainly and formally, nor allege particularly what liquors the defendant kept; and did not show but that the liquors kept were not otherwise

intoxicating than as so declared and considered by force of *St.* 1855, c. 215, § 1, contrary to the fact.

G. M. Stearns, for the defendant. 1. The opinion of the first witness, that what was found was gin, was not admissible, as it does not appear that he had any knowledge of the matter. 1 Greenl. Ev. § 440. *New England Glass Co. v. Lovell*, 7 Cush. 319.

2. Evidence that the defendant had jugs which had formerly contained liquor was improperly admitted, as it did not tend to show with what intent the defendant kept the liquor alleged in the complaint to have been unlawfully kept. *Commonwealth v. Madden*, 1 Gray, 486. *Ellis v. Short*, 21 Pick. 142. *Commonwealth v. Call*, 21 Pick. 522.

3. The allegation that the defendant kept intoxicating liquor contrary to the *St.* of 1855, c. 215, is insufficient, because it may apply to cider or wine, unintoxicating in fact, which § 1 declares "shall be considered intoxicating liquors, within the meaning of this act." The legislature have no power to declare unintoxicating liquors to be intoxicating, and punish them as if they were. 1 Bishop on Crim. Law, § 53, & cases cited.

4. The complaint does not describe with sufficient certainty the property kept—there being no statement of the kind or quantity. 1 Chit. Crim. Law, 236, 237. *Rex v. Chalkley*, Russ. & Ry. 258. *Rex v. Forsyth*, Russ. & Ry. 274. *Stewart v. Commonwealth*, 4 S. & R. 194. *Commonwealth v. Phillips*, 16 Pick. 211. It is not sufficient to allege an offence in the words of the statute. *Commonwealth v. Maxwell*, 2 Pick. 143. *Commonwealth v. Thurlow*, 24 Pick. 379. *Moore v. Commonwealth*, 6 Met. 243.

D. W. Alvord, (District Attorney,) for the Commonwealth.

BY THE COURT. 1. Whether a particular article is gin is not a subject requiring an expert, but a matter of general knowledge. If the witness did not know, he might say so.

2. The evidence of the jugs which had contained liquor was rightly admitted. They tended to show that the defendant kept liquor, which was a necessary step in proving that she kept liquor unlawfully.

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3. If the liquor sold was not in fact intoxicating, still, if it was within the liquors enumerated in the first section of the statute, the keeping of it with intent to sell was, by the terms of the statute, to be punished in the same manner as if it was intoxicating. And such an enactment is within the discretion of the legislature to pass.

4. The liquors are described in the complaint in the manner which has always been practised in similar cases. *Commonwealth v. Conant*, 6 Gray, 482.

Exceptions and motion in arrest overruled.

COMMONWEALTH vs. NORAH BURNS.

A sale of intoxicating liquor on credit is a sale within the meaning of *St. 1855, c. 215, § 15*.

The papers transmitted by a justice of the peace to the court of common pleas in a criminal case were a complaint, a record of the proceedings before the justice, signed by him, a warrant and officer's return, and a memorandum of a recognizance, signed by the justice. The warrant and the officer's return were each certified by the justice to be a true copy. *Held*, that, for want of an attestation of the conviction, the record was not sufficiently certified.

COMPLAINT to a justice of the peace, on *St. 1855, c. 215, § 15*, for unlawful sales of intoxicating liquors in Greenfield.

The papers transmitted by said justice to the court of common pleas were the complaint, with the jurat; on the back of that, the bill of costs, certificate of attendance of witnesses, and the record of the proceedings and appeal, signed by the magistrate; on the third page of the same sheet, the warrant; and indorsed on that, the officer's return, and a memorandum of the taking of a recognizance. The certificate of the oath to the complaint, and the last memorandum, were each signed "S. D. Bardwell, Justice of the Peace." At the foot of the warrant, and again after the officer's return, were these words: "A true copy, attest: S. D. Bardwell, Justice of the Peace." There was no other attestation of the papers.

At the trial there was evidence tending to show that William H. Foster, a person to whom one sale was alleged to have been made, "did not pay in cash for the liquor, but that the defendant was then indebted to him on account, and Foster, by the understanding of the parties, gave credit for the amount of said liquor in payment towards said account." The defendant contended that the delivery of liquor on credit, not in or from a dwelling-house, and therefore not within *St.* 1855, c. 215, § 34, and no action being maintainable for the price under § 37, was not a sale. But *Aiken*, J. instructed the jury that, "if the liquor was delivered by the defendant and received by Foster in part payment of the account, it would constitute a sale; and further, if such was not the transaction, that if it was the understanding of the parties that the liquor was thereafter to be paid for by Foster, and was not a gift to him, it would constitute a sale under the provisions of this law."

The defendant, being found guilty by the jury, moved in arrest of judgment, because the copies filed were insufficient. This motion was overruled, and the defendant alleged exceptions to this ruling and to the instructions to the jury.

W. Griswold, for the defendant.

D. W. Alvord, (District Attorney,) for the Commonwealth.

Dewey, J. 1. We see no ground for sustaining the exception that the sale would not be in violation of the *St.* of 1855, c. 215, if the payment was to be made at a future day, or the price charged in an account with the vendee.

2. But the motion in arrest of judgment must prevail. The jurisdiction, being wholly appellate, must appear upon the papers filed in the case. Among the necessary papers there must be a copy of the conviction, duly certified as a true copy by the magistrate. *Rev. Sts.* c. 138, § 2. No such certified copy is found in the papers returned to the court of common pleas in the present case. No judgment will therefore be entered upon the verdict; but the same will be set aside, and the case remitted to the court of common pleas for further proceedings, if the proper certified copies shall be filed in the case. *Commonwealth v. Doty*, 2 Met. 18.

Exceptions sustained.

COMMONWEALTH vs. GEORGE H. MILLER.

Drunkenness in another person's room in the house in which the party resides is punishable under Rev. Sts. c. 130, § 18, without proof that the drunkenness was made public.

In an indictment on Rev. Sts. c. 130, § 18, for a second drunkenness, an averment that the defendant, at a certain time, and before a certain court, "was duly and legally convicted of the crime of drunkenness, committed at" a certain time and place, is a sufficient allegation of a first conviction; and may be supported by a copy of a record of a conviction of the crime of drunkenness by the voluntary use of intoxicating liquor.

COMPLAINT to the police court of Chicopee, on Rev. Sts. c. 130, § 18, alleging "that George H. Miller of said Chicopee, on the third day of August in the year of our Lord one thousand eight hundred and fifty six, at said Chicopee, with force and arms was guilty of the crime of drunkenness, by the voluntary use of intoxicating liquor. Also that the said George H. Miller, on the second day of said August, at said Chicopee, before said police court, was duly and legally convicted of the crime of drunkenness, committed at said Chicopee on the first day of said August, which judgment is in full force and not reversed, against the peace of said Commonwealth, and the form of the statutes in such cases made and provided."

A trial was had in the court of common pleas in Hampden at December term 1856, before *Morris, J.*, who signed this bill of exceptions :

"The only witness for the government testified to several acts, sayings and doings and appearances of the defendant, indicating his intoxication at the time charged ; but he testified that the defendant was, when he saw him first, in the tenement of one Bryant, which tenement was in the same house where the defendant lived ; that he was quietly smoking, and that the person who accompanied him to this place, and who was an officer, arrested the defendant and took him to the street and from thence to the lock up. The defendant asked the court to instruct the jury that, as he was not drunk in any public place, and gave no publicity to his drunkenness, it was no offence. The court refused so to instruct the jury, but instructed them that if he was drunk at said Bryant's he was liable.

"The government offered a record of the police court of Chicopee to sustain the second allegation of the complaint. The defendant objected, because it was a record that the defendant was adjudged guilty of the crime of drunkenness by the voluntary use of intoxicating liquor; whereas the complaint did not formally, substantially and fully aver any such adjudication, or the offence of which the adjudication was had. The court admitted the evidence.

"The government offered, in support of the complaint, an attested copy of the record of the police court of Chicopee, which set forth that the defendant pleaded guilty to the allegations of this complaint before said police court. The defendant objected that the same was not competent as proof in the case. But the court admitted this record also as evidence against the defendant.

"To all which the defendant excepts;" and also moved in arrest of judgment, because "no offence is set out in the first count, fully, plainly and formally described to him, inasmuch as it simply states the legal results of acts, instead of alleging the acts done;" and because "the second count does not allege that the defendant was convicted of the crime of drunkenness by the voluntary use of intoxicating liquor."

G. M. Stearns, for the defendant. 1. Private drunkenness is no legal offence. In order to be punishable, it must be to the evil example of others; it must be in public.

2. Evidence that the defendant was convicted of being "drunk by the voluntary use of intoxicating liquor" should not have been admitted under a simple allegation of a conviction of "the crime of drunkenness." And that allegation is itself insufficient to support a conviction.

3. The plea of guilty in a former case should not have been admitted as evidence in this.

4. The complaint should have alleged the commission of the acts constituting the offence, and not merely that the defendant was guilty of the crime.

D. W. Alvord, for the Commonwealth. 1. It was not necessary to prove that the defendant was publicly drunk. Drunken-

ness was first made a crime by St. 4 Jac. 1, c. 5, (1606,) the reasons of which, as set forth in the preamble, are, that "the loathsome and odious sin of drunkenness is of late grown into common use within this realm, being the root and foundation of many other enormous sins, as bloodshed, stabbing, murder, swearing, fornication, adultery and such like, to the great dishonor of God and of our nation, the overthrow of many good arts and manual trades, the disabling of divers workmen, and the general impoverishing of many good subjects, abusively wasting the good creatures of God." There is not a word in that statute, or in the St. of 7 Jac. 1, c. 10, about publicity or the effect of the crime upon others by way of example. So Blackstone classes "drunkenness" among the "offences against God and religion." 4 Bl. Com. 64. Our ancestors meant the same thing in the act of 1692, which is curiously like the English statute. Anc. Chart. 238. The Rev. Sts. c. 130, § 18, include all persons "guilty of the crime of drunkenness by the voluntary use of intoxicating liquor." The decisions and dicta which seem to support the defendant's position were founded on different statutes. *Smith v. State*, 1 Humph. 396. *State v. Deberry*, 5 Ired. 371. *Commonwealth v. Whitney*, 5 Gray, 88.

2. If the offence must be public, it was so in this case, having been committed in a tenement from which the defendant could not exclude other persons, and where he was therefore liable to be seen committing the sin, in evil example to others.

3. The defendant's former plea of guilty was competent evidence of the facts thereby confessed.

4. The recital of a former conviction need not be more particular in an indictment for a second offence under Rev. Sts. c. 130, § 18.

This case was decided at Boston in June 1858.

METCALF, J. The court are unanimously of opinion that the rulings of the judge at the trial were correct, and that the exceptions thereto must be overruled. And a majority of the court are of opinion that the motion in arrest of judgment must also be overruled. This form of allegation, however, is not to be commended. *Exceptions and motion in arrest overruled.*

COMMONWEALTH *vs.* PATRICK O'BRIEN.

On the trial of an indictment for keeping a disorderly house, evidence of the doors being broken while the defendant occupied the house is admissible.

INDICTMENT for keeping a disorderly house. At the trial in the court of common pleas in Hampden, the district attorney called a witness, who testified that he let the house to the defendant; and, in order to show the disorderly conduct of those who resorted to the house, asked the witness, whether there had been any injury done to the house during the time for which it had been occupied by the defendant, (and which was covered by the indictment,) and whether his attention had been called to it. The defendant objected to the question. But *Morris, J.*, (upon being assured by the district attorney that he expected to show that the injuries were done by persons who frequented the defendant's house,) overruled the objection, and allowed the question to be put. And the witness testified "that, on one occasion, he found the doors broken in the house, and the defendant told him he would repair them if he would not do or say anything about it." The jury returned a verdict of guilty, and the defendant alleged exceptions.

E. W. Bond, for the defendant.

D. W. Alvord, for the Commonwealth.

By THE COURT. The defendant, though not the owner of the house, was in the possession and occupation of it, and therefore responsible for the manner in which it was kept. The usual evidence to prove that a house is disorderly is of such noise in the house as to make it a nuisance; but it may also be incidentally shown by proof of quarrelling and fighting, or of breaking in by persons whom it is attempted to keep out, or breaking out by those whom it is attempted to keep in. The evidence was therefore properly admitted. *Exceptions overruled.*

COMMONWEALTH vs. ETHAN B. COLTON.

A statute prohibiting the use of bowling alleys after six o'clock on Saturday afternoons is constitutional.

An indictment or complaint on *St.* 1855, c. 429, § 1, for illegally keeping open a bowling alley, need not allege that it was done for gain.

COMPLAINT to the police court of Springfield on the *St.* of 1855, c. 429, § 1, alleging that the defendant, at Springfield, on the 14th of July 1855, "with force and arms, was the keeper for the time being of a certain bowling alley there situate, and being the keeper of said alley so as aforesaid, did there and then suffer and permit certain persons to said complainant unknown, to play at and in the said bowling alley after the hour of six o'clock in the afternoon of said fourteenth day of July, the same being Saturday, against the peace of said commonwealth, and the form of the statutes in such cases made and provided."

The defendant, being convicted in the court of common pleas in Hampden, brought the case to this court upon exceptions to the rulings of the presiding judge; and now waived his exceptions, and moved in arrest of judgment for the following reasons:

"1st. Because the statute under which said complaint is found is unconstitutional and void.

"2d. Because it is not alleged in said complaint that the defendant suffered or permitted certain persons to play in his bowling alley for hire, gain, reward or profit."

E. W. Bond, for the defendant.

D. W. Alvord, for the Commonwealth.

BY THE COURT. 1. This complaint is founded on the *St.* of 1855, c. 429, which imposes a penalty on "the keeper for the time being of any billiard room or table, or of any bowling alley, who shall suffer any persons to play at the same after six o'clock in the afternoon of Saturday, or after ten o'clock in the afternoon of any other day." It is clearly within the power of the legislature to make police regulations as to the hours and

modes of occupying places of amusement, so as to make their use consistent with the peace of the community. The reasons which induced the legislature to make it penal to suffer any persons to play after certain hours in the evening are not for us to inquire into.

2. The statute does not make hire, gain or reward necessary to the offence, and therefore requires no such allegation in a complaint or indictment thereon.

Motion in arrest overruled.

COMMONWEALTH vs. PATRICK FOGERTY & others.

An indictment for rape sufficiently states that it was by force, by alleging that the defendant "violently and against her will feloniously did ravish and carnally know" the woman.

An indictment for rape need not aver that the woman ravished was not the wife of the defendant.

RAPE. The indictment alleged that the defendants, on the 26th of April 1857, at Chicopee, "with force and arms in and upon Agnes O'Connor, a female of the age of ten years and more, in the peace of said commonwealth then and there being, violently and feloniously did make an assault, and her the said Agnes then and there violently and against her will feloniously did ravish and carnally know, against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided."

The defendants, after a conviction in the court of common pleas, moved in arrest of judgment, "because it is not alleged in the indictment, that said Agnes O'Connor was ravished, &c. by force, as required by law;" and "because it is not alleged but that said Agnes O'Connor was the wife of one of the defendants, or which defendant, if any." The motion was overruled, and the defendants alleged exceptions.

G. M. Stearns, for the defendants. 1. In order to constitute

this offence, the carnal knowledge must be had "by force" as well as "against the will" of the woman. Rev. Sts. c. 125, § 18. It is therefore necessary to allege the act in the words of the statute, or in equivalent words. 1 Chit. Crim. Law, 281, 282. The words "with force and arms" in the indictment, if they could be applied to the allegation of ravishment, (which they cannot, as it is a separate traversable allegation,) would only show that force was a concomitant, not that it was the means of accomplishment of the act. An act may be done "violently," and yet not accomplished "by force." 3 Greenl. Ev. § 211. 1 Bishop Crim. Law, §§ 134 & seq. The forms in use in this commonwealth contain the allegation "by force." D. Davis's Justice, 591; (3d ed.) 674.

2. A man cannot commit a rape on his own wife. 1 Hale P. C. 629. Archb. Crim. Pl. (Waterman's ed.) 306, note. 1 Russell on Crimes, 676. It is therefore necessary to allege, as in the case of adultery, that the woman was not the wife of the defendant; because the facts alleged may be true, and yet no crime committed. *Moore v. Commonwealth*, 6 Met. 243. *Rex v. Folkes*, 1 Moody, 354. The form used in this case is no more sustained by precedent than was the form for adultery, which was held bad in 6 Met. 243.

D. W. Alvord, for the Commonwealth.

BIGELOW, J. The indictment in the present case is in conformity with well established precedents. It sufficiently sets forth all the elements necessary to constitute the offence of rape. It alleges that the carnal knowledge was had "violently," which means by violence, and was against the consent of the prosecutrix. The word ravished — "*rapuit*" — of itself imports the use of force, and, when coupled with the allegation that the act was done against the consent of the woman, technically charges the crime of rape, which is the carnal knowledge of a woman by force and against her will. Co. Lit. 137. 2 Inst. 180. 1 Hawk. c. 16, § 2. 2 Hawk. c. 23, § 79. 2 Stark. Crim. Pl. (2d ed.) 431. Archb. Crim. Pl. (10th ed.) 480. Indeed it has been held that the omission to charge an assault is not fatal to an indictment for rape, when it was alleged, as in this case, that

the defendant violently and feloniously ravished and carnally knew the prosecutrix against her will. *Regina v. Allen*, 9 Car. & P. 521, & note. *Harman v. Commonwealth*, 12 S. & R. 69.

It is true that, in this commonwealth, it has been usual, in indictments for this crime, to aver that the act was done "by force." This practice probably grew out of the phraseology of the statute, which used the words "by force and against the will," in providing a punishment for the offence. But it is never necessary to charge a crime in the words of the statute. It is sufficient that the indictment sets out in technical language all the essential ingredients which make up the crime. It is then fully, plainly, formally and substantially described.

2. Nor was it necessary to allege that the prosecutrix was not the wife of the defendant. Such an averment has never been deemed essential in indictments for rape, either in this country or in England. The precedents contain no such allegation. See authorities before cited. A husband may be guilty at common law as principal in the second degree of a rape on his wife by assisting another man to commit a rape upon her; *Lord Audley's case*, 3 Howell's State Trials, 401; and under our statutes he would be liable to be punished in the same manner as the principal felon. Rev. Sts. c. 133, § 1. An indictment charging him as principal would therefore be valid.

Of course, it would always be competent for a party indicted to show, in defence of a charge of rape alleged to be actually committed by himself, that the woman on whom it was charged to have been committed was his wife. But it is not necessary to negative the fact in the indictment. *Exceptions overruled.*

COMMONWEALTH vs. MARGARET STEBBINS.

Upon the trial of an indictment for larceny, the defendant's taking of the property was proved; and the jury were instructed that he was not guilty if they were satisfied that he took the property under an honest belief that he had a legal right to take it in the way and under the circumstances that he did take it, although in fact he might have had no such legal right. *Held*, that this gave him no ground of exception.

The testimony of a single witness, that he received certain bank bills in a neighboring state, and that they were bills of banks there, is sufficient evidence to be submitted to a jury of those bills being of value and current in this commonwealth.

A defendant may be convicted, under Rev. Sts. c. 126, § 17, of stealing bank bills, without proof of their form or tenor.

Taking money with intent to appropriate it to the payment of a debt due to the taker from the party from whom it is taken is sufficient evidence of a conversion to the taker's own use, to constitute larceny.

Evidence that one charged with larceny was reputed at the time to be a person of property is inadmissible in his defence.

Upon an indictment for stealing bank bills and a gold coin, the jury returned this verdict: "Guilty, but not of taking the gold piece." *Held*, that the court might, against the objection of the defendant, record this verdict as a verdict of not guilty as to so much of the indictment as related to the stealing of the gold coin, and guilty as to the residue; although the jury, pursuant to agreement of the parties, had separated after finding their verdict.

An indictment for stealing bank bills, which states the amount and value of the whole, need not describe their number or denomination.

INDICTMENT on Rev. Sts. c. 126, § 17, for the larceny of "sundry bank bills current within said commonwealth, amounting to the sum of two hundred and ten dollars, and of the value of two hundred and ten dollars, and one gold coin current within said commonwealth, of the denomination of two dollars and fifty cents, and of the value of two dollars and fifty cents, of the goods and chattels and money of one Patrick Dorsay," at Springfield, on the 18th of January 1853. Trial in the court of common pleas in Hampden, at December term 1856, before *Morris, J.*, who signed a bill of exceptions, the material parts of which were as follows:

The following facts appeared in evidence: In 1849 the defendant lent \$200 in cash to Michael Dorsay, in the presence of his son Patrick, and took his note therefor, payable on demand, with interest. The money thus lent was used in keeping a shop in Holyoke by Patrick, in the name of Michael, who

soon after died, leaving no will, and no heirs but Patrick. No letters of administration were taken out upon his estate; but Patrick took all his property and appropriated it to his own use, and went to Middletown in Connecticut to reside. On the 18th of January 1853 Patrick came from Middletown and passed the night in Springfield at the house of Jerry Whalen, where the defendant also then was. When Dorsay went to bed, he placed under his pillow his pocket book, containing the bills and gold coin mentioned in the indictment. But one Dee, who was to sleep with Dorsay, insisting on having the money counted, Whalen took the pocket book from under the pillow, and, in the presence of Dee, of Dorsay and the defendant, counted the money upon a table near the bed. Immediately after it was counted the defendant took the bank bills, and refused to give them up, saying "that she had a right to it; that she had been looking for it a long time, and now she had got it; that the old man owed her, and now it was time for her to get her own." When she took the bills, no part of Michael Dorsay's note, which she held, had been paid.

"The court instructed the jury that Michael Dorsay's property descended to Patrick, subject to the payment of debts; that Patrick was an executor in his own wrong, and as such was liable on the claim held by the defendant against Michael Dorsay, to the extent of his intermeddling with his father's estate; and that the defendant would not be guilty of larceny, if the jury were satisfied that she took this money under an honest belief that she had a legal right to take this specific money in the way and under the circumstances that she did take it, although in fact she may have had no such legal right.

"The defendant contended that the only evidence that the bank bills taken by the defendant were of any value, or that they were current within this commonwealth, was the testimony of Patrick Dorsay, who stated that he received said bills in the State of Connecticut, and that they were bills of Connecticut banks, most of them being bills of the Middletown banks, and there being three banks in Middletown. The defendant asked the court to instruct the jury that the defendant

could not be legally convicted, because there was no evidence that she took the gold coin, and because there was no evidence that the bank bills were current within this commonwealth or were of any value. It was admitted that there was no evidence that she took the gold coin. But the court declined to instruct the jury as requested; but did instruct them that they must be satisfied that said bills were of value, and were current in this commonwealth.

"The defendant also asked the court to instruct the jury that the defendant could not be convicted of stealing 'bank bills,' that being no offence in this commonwealth, and there being no evidence that said bills were in the form of 'bank notes' or 'promissory notes,' or what the form or tenor of said bills was. But the court refused so to instruct the jury, and did instruct them that the defendant might be convicted of stealing 'bank bills,' if they were satisfied that she took them with a felonious intent.

"The defendant further asked the court to instruct the jury that, to constitute larceny, the defendant must have converted or intended to convert the money to her own use; and if she appropriated or intended to appropriate it to the payment of a note which, or any part of which, Patrick Dorsay was legally liable to pay, it would not be such a conversion to her use as would be necessary to constitute larceny. But the court declined so to instruct the jury, except that the defendant must have converted or intended to convert the money to her own use.

"The defendant offered to prove by several witnesses that she was generally reputed, in January 1853, to be a woman of property. But the court rejected the evidence, and ruled that the only evidence which was admissible on this point was evidence of her having specific visible property which was liable to attachment.

"The jury retired to their room in this case shortly before the hour of adjournment of the court at night, and it was agreed by the defendant that if the jury should not agree before the court adjourned, they might seal up their verdict and separate. The jury did not agree till after the adjournment of the court,

and the next morning they returned this sealed verdict, which was written on a bit of paper, and the only words or marks on the paper were 'Guilty—but not of taking the gold piece.' The defendant objected to this verdict being received or recorded. Thereupon the presiding judge directed the clerk to affirm the verdict in this form, 'Guilty, except as to so much of the indictment as relates to one gold coin; and not guilty as to so much thereof as relates to said gold coin.' The clerk then read to the jury the verdict as thus written. Whereupon the defendant objected that the jury having separated since they had agreed on their verdict, the form of the verdict could not be afterwards changed without the defendant's consent. But the court overruled the objection, and allowed the verdict to be affirmed in this form. The defendant objected to this verdict being received or recorded; but the court overruled the objection.

"The defendant excepts to the foregoing rulings and instructions;" and also moved in arrest of judgment, because the bank bills were not sufficiently described in the indictment, and excepted to the overruling of this motion.

E. W. Bond, for the defendant.

D. W. Alvord, for the Commonwealth.

METCALF, J. 1. The instruction to the jury, that the defendant was not guilty of larceny, if she took the money under an honest belief that she had a legal right to take it, was clearly unexceptionable.

2. It was not for the court, but for the jury, to decide whether the testimony of Dorsay was sufficient to satisfy them that the bank bills, which the defendant took, were current in this commonwealth, and were of value, as alleged in the indictment. The court therefore rightly declined to give the instruction which was requested on this point.

3. The instruction, that the defendant might be convicted of stealing bank bills, if she took them with a felonious intent, was correct; as has been heretofore decided. Bank bills are "bank notes," within the meaning of the Rev. Sts. c. 126, § 17, on which this indictment is framed. *Eastman v. Commonwealth*, 4 Gray, 416.

4. There can be no doubt, that though the defendant took the money with the intent to appropriate it to the payment of a note which she held, yet her intent was to appropriate it to her own use.

5. Nor can there be any doubt that evidence of the defendant's being reputed, at the time when she took the money, to be a person of property, was rightly excluded. It would have had no legal tendency to prove that the taking of the money was not felonious.

6. We see no objection to the verdict, as recorded, nor in the proceedings of the court respecting it. "Howsoever the verdict seem to stray," says Lord Hobart, "and conclude not formally or punctually unto the issue, so as you cannot find the words of the issue in the verdict, yet if a verdict may be concluded out of it to the point in issue, the court shall work it into form, and make it serve." *Foster v. Jackson*, Hob. 54. See also 2 Gabbett Crim. Law, 529; 1 Chit. Crim. Law, 646.

7. The case already cited (4 Gray, 416,) is conclusive that bank notes are properly termed "bank bills" in an indictment for stealing them; and in *Larned v. Commonwealth*, 12 Met. 245, 246, the opinion of the court was intimated, that a particular description of the number and denomination of the bills was not required in such an indictment. For the reasons there suggested, we are of opinion that the present indictment is sufficient to warrant a judgment on the verdict. It has been already decided that such an indictment is sufficient, if it contains an averment that the grand jury have not the means of describing the bills more particularly. *Commonwealth v. Sawtelle*, and *Commonwealth v. Duffy*, 11 Cush. 142, 145.

Exceptions overruled.

COMMONWEALTH vs. HORACE W. BEAMAN.

A district attorney's signature to an indictment need not show for what district he is attorney.

Peafowls are subjects of larceny.

An indictment for stealing any animal, which does not state whether it is alive or dead, is not supported by evidence that it was dead when stolen; even if it is an animal which has the same appellation whether dead or alive.

Thus an indictment for stealing "one peahen" and "one turkey" in this commonwealth, is not supported by evidence of taking them alive in another state, and bringing them dead into this state.

INDICTMENT against Byron Dodge and Horace W. Beaman for sundry larcenies. The only count on which Beaman was convicted alleged that the defendants at Ludlow on the 30th of January 1857 "one peahen of the value of five dollars, and one turkey of the value of three dollars, of the goods and chattels of one Elam L. Pease, then and there in his possession being found, feloniously did steal, take and carry away, against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided."

The indictment was signed "A true bill, Benning Leavitt, Foreman," and countersigned, "Edw. B. Gillett, District Attorney."

A trial was had in the court of common pleas in Hampden, at May term 1857, before *Morris*, J., to whose rulings Beaman alleged exceptions, in which the case was thus stated :

"Evidence was offered to prove, that said fowls were taken from the possession of the owner, Elam L. Pease, at Enfield, in the State of Connecticut, and were subsequently, within a few days, found dead in the possession of the defendants, in said county of Hampden. No evidence was introduced by the Commonwealth to prove what was the law in the State of Connecticut in regard to larceny, or that the taking of the property in question was a larceny under the law of that state. Pease testified that he bought said peahen and had owned her about three years, and fed her nearly every day at his door, and that she had young chickens; and that he had owned said turkey about two months.

"The defendants asked the court to instruct the jury, and the court instructed them, that they could not convict the defendants unless they were satisfied that a larceny of said fowls was committed in the State of Connecticut. The defendants also asked the court to instruct the jury that, as the Commonwealth had introduced no evidence that this would be a larceny under the laws of Connecticut, they could not, for that reason, convict the defendants. Upon this point the court ruled and instructed the jury that this would be a larceny at common law, and that it was to be presumed to be a larceny under the laws of Connecticut, unless the contrary appeared.

"The defendants also asked the court to instruct the jury that a peahen was not the subject of larceny, as it does not serve for food, but is kept for whim and pleasure; also that if said fowls were alive when originally taken from the possession of the owner in Connecticut, and were killed before being brought into this state, the nature of the property had so changed that the defendants could not be convicted for stealing it in this state; also that if said fowls were alive when originally taken from the possession of the owner in Connecticut, and were killed before being brought into this state, the defendants could not be convicted of stealing them in this state, because, it not being alleged in the indictment that the fowls were dead when stolen in said county of Hampden, they were to be considered as alleged to be live fowls, and there was therefore a fatal variance between the allegation and the proof. But the court refused to grant any of said instructions."

Beaman also moved in arrest of judgment, and excepted to the overruling of that motion,

"1st. Because it does not appear that Edw. B. Gillett, who certifies said indictment as district attorney, was a district attorney for the western district of this commonwealth, and because he does not, as such, certify said indictment to be a true bill.

"2d. Because the peahen, mentioned in said count, is not the subject of larceny, it being an animal kept for whim and pleasure, and not serving for food."

E. W. Bond, for the defendant.

D. W. Alford, for the Commonwealth.

This case was decided at Boston in June 1858.

METCALF, J. The reasons assigned for the motion in arrest of judgment are wholly insufficient.

1. The signature of the district attorney, if it be necessary that it should be affixed, in any form, to an indictment, was properly affixed in this instance. The Rev. Sts. c. 13, § 39, authorize district attorneys to interchange the duties of their offices. Of course it is not necessary that it should appear, on an indictment, that he who certifies or attests it is the attorney for the district in which it is found.

2. Peacocks are among the domestic fowls which are the subject of larceny. 1 Hawk. c. 33, § 43. 2 East P. C. 607. 2 Russell on Crimes, (7th Amer. ed.) 82.

3. We are of opinion that the jury should have been instructed, as the defendants requested, "that if the said fowls were alive when originally taken from the possession of the owner in Connecticut, and were killed before being brought into this state, the defendants could not be convicted of stealing them in this state." The true legal reason for this instruction is stated in the prayer therefor. The law on this point is thus stated in the books: An indictment for a larceny of live animals need not state them to be alive, because the law will presume them to be so, unless the contrary be stated; but if, when stolen, the animals were dead, that fact must be stated; for, as the law would otherwise presume them to be alive, the variance would be fatal. Archb. Crim. Pl. (10th ed.) 171; (13th ed.) 49, 264. Rosc. Crim. Ev. (2d ed.) 577. 2 Deacon Crim. Law, 763. 3 Greenl. Ev. § 163. 2 East P. C. 607. *Rex v. Holloway*, 1 Car. & P. 128. *Rex v. Edwards & Walker*, Russ. & Ry. 497. In this last case, the defendants stole two turkeys in the county of Cambridge, killed them there, and then carried them into the county of Hertford, where the defendants were indicted for the larceny. The indictment charged them with stealing two live turkeys; and it was held that the word "live" could not be rejected as surplusage, and that, as the defendants had not the turkeys in a live state in the county of Hertford, the charge, as

laid, was not proved. The decision in that case must have been the same if the word "live" had not been inserted in the indictment; the word "turkeys," according to the authorities above cited, having the legal meaning of "live turkeys"; and so Holroyd, J., in that case, stated the law. That case cannot be distinguished, in principle, from the one now before us; for the same rule, which is applied to a felonious taking in one county and a carrying away into another, is applied to a felonious taking in one of the states of the Union and a carrying away into another. *Commonwealth v. Andrews*, 2 Mass. 14.

It was suggested by the counsel for the Commonwealth, that the rule of law on which the defendants rely, and which the court deem conclusive, is not applicable to this case; that "when an animal has the same appellation, whether it be alive or dead," (which is true of peacocks and turkeys,) "and it makes no difference, as to the charge, whether it be alive or dead, it may be called, in an indictment, when dead, by the appellation applicable to it when alive." And, in several modern English books, the rule is stated in the terms above quoted. But they all refer to the case of *Rex v. Puckering*, 1 Moody, 242, and 1 Lewin, 302. If that case, which was an indictment against a receiver and not against the thief, and the reports of which differ in some particulars, can be justly considered to support any distinction between animals that have the same appellation when dead and when alive, and other animals; we do not incline, on the authority of that case alone, to depart from what we have always supposed to be the legal meaning of an indictment charging the theft of an animal, without alleging it to be alive; namely, that it means a live animal.

Exceptions sustained.

COMMONWEALTH vs. LUTHER M. KING.

Under the Rev. Sta. c. 18, § 40, authorizing the court, "in the absence of the district attorney," to appoint a district attorney *pro tempore*, the court may make such an appointment when the office is vacant.

When the testimony in a criminal case consists of a great number and variety of circumstances, with which the acting district attorney is unfamiliar, the court may appoint another counsel, acquainted with the facts, to assist him.

It is no objection to the appointment of additional counsel for the Commonwealth, on an indictment for burning a building, that he conducted the prosecution before a magistrate, and was clerk of a fire inquest on this building under St. 1854, c. 424.

The testimony of a witness summoned before a fire inquest held under St. 1854, c. 424, reduced to writing and signed by him, is admissible against him on a trial for setting the fire, without showing that he was first cautioned that he need not criminate himself.

INDICTMENT for burning a barn in Wilbraham. Trial and conviction in the court of common pleas in Hampden at December term 1856, before *Morris, J.*, who signed this bill of exceptions:

"The office of district attorney being vacant, Henry Vose, Esq. was, at the commencement of the term, appointed district attorney *pro tempore*. Mr. Vose requested of the court that William L. Burt, Esq., of Boston, an attorney and counsellor, might be permitted to assist him in the conduct of this trial, inasmuch as the testimony consisted of a great number and variety of circumstances, with which and the localities referred to he was personally unfamiliar, but with which Mr. Burt, as the attorney who represented the Commonwealth before the examining magistrate, was fully conversant.

"The counsel for the defendant objected to this application being granted, on the ground that Mr. Burt had been the attorney for the prosecution before the examining magistrate, and had also acted as clerk in certain proceedings relative to these fires before a fire inquest, organized under St. 1854, c. 424.

"It appearing to the court that the case was one proper for such assistance as was requested by the district attorney *pro tempore*, and it not appearing that Mr. Burt had any private interest in the matter, the court ordered that Mr. Burt be appointed to assist the district attorney, at the same time notifying the latter that the trial must be under his responsible charge.

"The counsel for the Commonwealth offered in evidence, among other things, the testimony of the defendant taken in writing on oath before said fire inquest. It appeared that this inquest was held prior to the institution of any proceedings against the defendant; that he was duly summoned and testified with other witnesses before said inquest on oath; and that said testimony was reduced to writing and signed by the defendant. It did not appear that the defendant was cautioned that he need not criminate himself.

"To the admission of this testimony the counsel for the defendant objected, on these grounds: 1st. That it was unconstitutional. 2d. That no notice was given to the defendant that he need not criminate himself. 3d. That there was evidence to show that the testimony of the defendant was not correctly taken down as given by him. The court offered to allow the defendant's counsel to show, by other evidence, any facts alleged by him in support of these objections, that did not appear of record; but the counsel declined to procure any such evidence. The court thereupon admitted the testimony."

E. W. Bond, for the defendant. 1. The power of the court to appoint a district attorney *pro tempore* is limited to the case of "the absence of the district attorney." Rev. Sta. c. 13, § 40. The filling of vacancies belongs to the governor and council. § 36. St. 1856, c. 173, § 8.

2. The district attorney's want of familiarity with the circumstances of the case, as compared with the counsel who appeared for the Commonwealth before the magistrate, exists in a majority of criminal cases; and does not show the "stringent reason" required to justify the appointment of additional counsel. *Commonwealth v. Williams*, 2 Cush. 585. The reason being stated in the bill of exceptions, and being insufficient, no other sufficient reason for the appointment can be presumed.

3. Mr. Burt was not a suitable person to be appointed; because he did not reside within the district; and because he had been attorney for the prosecution before the magistrate, and clerk of the fire inquest. Rev. Sta. c. 13, § 36. *Commonwealth v. Gibbs*, 4 Gray, 146.

4. The testimony of the defendant, taken before the fire inquest, (at which he was compelled to attend and testify,) without his being previously cautioned not to criminate himself, was inadmissible. Declaration of Rights, art. 12. U. S. Constitution, Amendment 5.

D. W. Alvord, for the Commonwealth.

THOMAS, J. 1. The appointment of Mr. Vose as district attorney *pro tempore* was in conformity with the well settled practical construction of the statute.

2. If "stringent reasons" were requisite to justify the appointment of Mr. Burt to assist the district attorney, they are found in the facts developed by the bill of exceptions.

3. The reasons given in the argument for Mr. Burt's not being a suitable person, seem to us to indicate his peculiar fitness. They show a knowledge of the case, but no interest in the result.

4. We see no ground for excepting the statements made by the defendant before the fire inquest from the ordinary rule which allows the admissions or confessions of the defendant to be given in evidence against him. It appeared that he was duly summoned and sworn; and that his testimony was reduced to writing and signed by him. There was nothing to show that the testimony was not accurately stated.

The only objection relied upon in the argument is, that the witness was not cautioned that he need not criminate himself. This objection is not sustained as matter of fact. Whether or not the magistrate gave such caution to the witnesses would constitute no part of his record. *St.* 1854, c. 424. If it was his duty to give such caution, we may not presume that he omitted to give it. The statements of the defendant, in writing and signed by him, were clearly competent evidence against him, unless it was made to appear that something was done, or omitted to be done, which would take them out of the general rule. Full opportunity was given to the defendant to do this, but he declined to use it.

This ground disposes of the case. But we do not wish to be understood as expressing an opinion that such caution to the

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defendant was necessary, or that a failure to give it would render his statements incompetent evidence against him.

Exceptions overruled.

CHARLOTTE KELLOGG vs. INHABITANTS OF NORTHAMPTON.

In an action to recover of a town damages sustained by a defect in a part of the highway, which has been so wrought and repaired by the town for public travel as to induce the public to pass over it, the town cannot introduce evidence that that part of the highway was originally wrought for the accommodation of the abutters.

ACTION OF TORT for an injury received by the plaintiff from a defect in a highway in Northampton. See 4 Gray, 65. A second trial was had in the court of common pleas in Hampshire at February term 1857, before *Perkins, J.*, who signed a bill of exceptions, the substance of which was thus :

"It appeared that the house of the plaintiff's father, where she resided, and the house of Jared Bartlett were near each other, by the side of said highway, and that the plaintiff, in going from Bartlett's house towards a house in South Street, stepped upon a culvert, made of plank and covered with earth, within the limits of the highway ; and one of the planks gave way, and thus occasioned the injury.

"There was conflicting evidence upon the question whether the culvert was in that part of the highway wrought and used for public travel. The defendant offered to show, as bearing on this question, that the culvert was originally built at the request and for the accommodation of the plaintiff's father and Bartlett, to enable them more easily to pass and repass from their premises to the highway.

"But the court excluded the evidence, as immaterial for the purpose for which it was offered, and instructed the jury that, to entitle the plaintiff to recover, they must be satisfied that the place of the injury to the plaintiff was within the limits of that part of the highway wrought and prepared by the defend-

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ants in such manner as to admit the public travel, and which, being so wrought and prepared, had actually induced the public travel to come upon and pass along it in the line of the highway, and that it had been repaired by the defendants for the public use, and that, in consequence of these acts of the defendants, it had become a part of the path usually travelled by the public passing along the line of this road; that the passing of persons on the paths to and from the houses of Bartlett and Kellogg was not to be regarded as public travel for this purpose; that the defendants were not bound to repair the paths or ways to said houses, and therefore not liable for any defects therein; that the defendants were not liable for defects, unless in wrought and publicly travelled path as above stated. To the above rejection of evidence the defendants except."

S. T. Spaulding, for the defendants.

C. Delano, for the plaintiff.

BEELOW, J.* The origin of the culvert and the purpose for which it was constructed at the time it was first built were wholly immaterial to the question at issue between the parties at the trial. The inquiry was as to its condition, and the mode in which the surface above it was wrought and used, at the time when the injury was done to the plaintiff. This was a distinct and independent proposition of fact, upon which the intent of the defendants in building the culvert several years before could throw no light. It would rather seem to distract the attention of the jury from the real point at issue by raising a collateral and irrelevant inquiry. By the instructions given to the jury, the whole case was made to turn on the construction, condition and use of the culvert, and the surface above it, at the time of the accident. To render a verdict for the plaintiff, the jury must have found that the place where the accident happened was within the limits of that part of the highway wrought and prepared by the defendants for public travel; that, being so wrought and prepared, persons travelling along the line of the highway were induced to come upon and pass over it; that, after it had

* DEWEY, J. did not sit in this case.

been so used for public travel, the defendants had repaired it; and that, in consequence of these acts of the defendants, it had actually become part of the path or track usually travelled by the public in passing over the road. Under these instructions, no inquiry concerning the object for which the defendants originally built the culvert would have been material or proper. It must have been found to have been adopted and incorporated as a part of the highway, wrought, intended and used for public travel at the time when the accident occurred, without regard to the purpose or design of its original construction.

It does not appear by the facts stated in the bill of exceptions that the plaintiff was injured while passing from the house of Bartlett to the highway. It is stated that she was passing along the highway from the house of Bartlett towards a house in South Street. Nor does it appear that any question was raised at the trial as to the right of the plaintiff to recover on the ground that, at the time of the accident, she was not in the use of the highway in the same manner and for the same purposes as other travellers.

Exceptions overruled.

RODNEY FISK *vs.* INHABITANTS OF CHESTER.

Since the *St.* of 1856, c. 188, a party to a suit, in which the issue is in which of two towns his domicil was at a particular time, may testify to the intent with which he removed from one town to the other shortly before, and returned soon after, that time.

Evidence that the selectmen of a town decided that a person taxed there was an inhabitant, and put his name upon the voting list, is not admissible for the purpose of showing that his domicil was in that town, without showing that they did it at his request.

ACTION OF CONTRACT to recover back the amount of a tax of the town of Chester upon the plaintiff's personal property for 1854, when he was, as he alleged, an inhabitant of Huntington. Trial and verdict for the plaintiff in the court of common pleas in Hampshire, at October term 1856, before *Morris, J.*, to whose rulings the defendant excepted, and stated the case thus :

Fisk v. Inhabitants of Chester.

"The only question made in the case related to the place of domicile on the 1st of May 1854. It was proved that the plaintiff owned farms in each of said towns, about seven miles apart; that prior to 1853 he resided in Huntington; but that in 1853 he removed to Chester, voted in that town, gave in and swore to his list of personal and other property, and was taxed therefor. Between the 24th and 29th of April 1854 he transported his family and a portion of his effects in a wagon from Chester to Huntington. Between the 1st and 20th of May, he went back with his wife and a portion of his family to Chester; after staying two or three days, he went back to Huntington; and soon after the 20th of May he went back to Chester, where he resided during the principal portion of the summer and autumn, and then returned to Huntington. He proved that he was placed upon the voting list and voted in Huntington in 1854.

"The plaintiff was sworn as a witness, and testified, under the objection of the defendants, that when he removed from Chester to Huntington in April 1854, he intended that his home should be in Huntington permanently, and that he removed there for that purpose.

"The plaintiff's counsel inquired of the plaintiff, 'When you went back to Chester with your family the latter part of May, had you any intention to remain in Chester, or did you intend to go back to Huntington?' The plaintiff replied that he went back to Chester to manage his farm, but never intended to make Chester his home. The defendants objected to the question and answer.

"The defendants offered to show, by one of the assessors and selectmen of Chester for 1854, that the selectmen decided that Fisk was an inhabitant of, and a voter in, Chester May 1st 1854, and that his name was placed by them and was upon the list of voters. The plaintiff objected; the evidence was ruled out."

W. G. Bates, for the defendants. 1. It was not the object of the *St.* of 1856, c. 188, to extend the sphere of evidence; but only to enable parties to testify to the same facts which could have been testified to by other witnesses before that statute.

Besides; the plaintiff's testimony as to his intention in April was not competent or material upon the question where his domicile was on the 1st of May. And his acts after the 1st of May were inadmissible to fortify him.

2. The decision of the selectmen of Chester, that the plaintiff was an inhabitant and a voter in Chester on the 1st of May, and the fact that his name was placed by them on the voting list, and was thereon on the 1st of May, are facts competent to prove his residence in Chester. *West Boylston v. Sterling*, 17 Pick. 128.

R. A. Chapman, for the plaintiff.

BY THE COURT. If we were deciding the question of the plaintiff's domicile upon the 1st of May 1854, we should need more facts. But all we have to consider is the exceptions taken. We must presume that in other respects the jury were rightly instructed.

1. It is very clear that, under the *St.* of 1856, c. 188, the plaintiff was rightly permitted to testify to his intention at the times of his removal from Huntington to Chester, and of his return to Huntington. A man may determine where his home shall be, and thus incidentally determine where he shall be taxed. Before parties were made competent witnesses, it was the practice to prove their intent by a variety of circumstances, because no man can know the secret purposes of a man's heart except himself. But now that parties are made competent witnesses, it necessarily follows that they may testify to any facts material to the issue. His intent at the time of removal is a fact qualifying the act, and therefore admissible.

2. The selectmen had no authority to determine that the plaintiff was an inhabitant of Chester, and to put his name on the voting list, except upon his application; and there was no evidence that he had made such an application. The testimony of one of them to their acts was therefore properly rejected.

Exceptions overruled.

OTIS COMPANY *vs.* INHABITANTS OF WARE.

The sworn list of estate liable to taxation, required by *St.* 1853, c. 319, § 3, in order to authorize any abatement of a tax, cannot be filed after an appeal from the assessors to the county commissioners.

The *St.* of 1853, c. 319, § 3, providing that "no abatement shall be made of the taxes assessed upon any individual," until he shall have filed with the assessors a sworn list of his estate, applies to corporations.

PETITION for a *certiorari* to the county commissioners of Hampshire, in the matter of a tax assessed by the town of Ware upon the petitioners, a corporation established in that town. The case is stated in the opinion.

S. T. Spaulding & C. W. Huntington, for the petitioners.

C. Delano, for the respondents.

DEWEY, J. 1. By the provisions of the *Rev. Sts. c. 7, § 37*, any person aggrieved by the taxes assessed upon him, might apply to the assessors for an abatement thereof, who, upon reasonable cause shown, may make an abatement to him; and this as well where no list of his taxable property had been duly brought in under the notice of the assessors requiring the same, as where such list had been brought in. No application, however, could be made to the county commissioners, by way of appeal from a refusal of the assessors to abate a tax, unless he had brought in a list of his estate to the assessors, or shown good cause for not having so done. In case of such application to the assessors for abatement, they might, at their discretion, examine the party applying for such abatement, upon oath, as to his estate. But the provisions of the *Rev. Sts. c. 7*, left the assessors free to abate in all cases, without subjecting the party to examination as to his estate under oath.

The *St.* of 1853, c. 319, § 3, makes more stringent provisions on this subject, and enacts that "no abatement shall be made of the taxes assessed upon any individual, until he shall have filed with the assessors a list of his estate liable to taxation, and made oath that it is a full and accurate list of the same, according to his best knowledge and belief." No time is, however,

fixed by the statute for filing such list; and it has been contended that such list may be filed as well after as before the assessment of the tax, with the right of appeal, in either case, to the county commissioners from the refusal of the assessors to abate the tax.

The recent *St.* of 1857, *c.* 306, is more explicit in its provisions, and directly provides that, where such sworn list shall not be filed within the time specified by the assessors for bringing in such list, no appeal from the judgment of the assessors shall be sustained by the county commissioners, unless they shall be satisfied that there was good cause why such list was not seasonably brought in.

The present case arose before the passage of the statute last named, and must be governed by *St.* 1853, *c.* 319. That statute is imperative in forbidding any abatement of taxes until a list under oath has been filed with the assessors. No such list was filed with the assessors at any period of time before or during the pendency before them of the petitioners' application for an abatement of taxes. It was only after an appeal had been made to the county commissioners to revise the proceedings of the assessors and reverse their decision, that such list was filed. This was too late. The commissioners might properly refuse to entertain the complaint, upon that ground. The assessors had no jurisdiction to act in the matter without such sworn list, and of course no ground existed for a complaint that they had refused to make an abatement. *Porter v. County Commissioners*, 5 Gray, 365.

2. But it is further contended, on the part of the petitioners, that they, being an incorporated company, and holding their estate solely as a corporation, are not to be affected by the *St.* of 1853, *c.* 319, § 3, the provision therein being that "no abatement shall be made of the taxes assessed upon any individual," until he shall have filed a list under oath. The word "individual," it is said, does not include corporations. But an examination of the various statute provisions in the numerous sections of *c.* 7 of the *Rev. Sts.* can leave no doubt in the mind upon this point. Corporations, like individuals, are subject to taxation

for all their real and personal estate within the Commonwealth. They are, however, named but in a single instance, and that in referring to the town where the machinery used by a manufacturing corporation shall be assessed to such corporation. § 10. All the other provisions as to lists, abatement, &c. omit the use of the term "corporation." There is great diversity in the use of terms to indicate the persons and estates to be affected by the provisions of this chapter. In regard to the list to be brought in, the notice is "to the inhabitants" to bring in true lists. § 19. Then the assessors may require "any person," bringing in such list, to make oath that the same is true. § 20. Again; the assessors shall receive as the true valuation of the property of "each individual" the list brought in. § 22. Of these descriptions of taxpayers, only one, "any person," strictly includes corporations. This does so by Rev. Sts. c. 2, § 6, *cl.* 13, declaring the word "person" may be applied, in those statutes, to bodies corporate as well as individuals. It is provided, by § 40 of c. 7, that no person shall have an abatement by the commissioners, unless he shall have brought in a list of his estate to the assessors, &c., thus clearly indicating that, in § 19, the notification "to the inhabitants" to bring in lists, applies to corporations. Such has been the uniform construction of c. 7, applying its provisions equally to corporations and individuals, and giving like effect in this respect to all the varied forms of expression, "inhabitants," "persons" or "individuals." *Newburyport v. County Commissioners*, 12 Met. 211. *Winnisimmet Company v. Assessors of Chelsea*, 6 Cush. 477.

In the opinion of the court, the provisions of St. 1853, c. 319, § 3, do apply to corporations; and, like individuals, they must file with the assessors a list of their estate liable to taxation, subscribed and sworn to by their proper officers, before the assessors can grant them any abatement of their taxes. This not having been done in the present case while the application for such abatement was pending before the assessors, the petitioners have no legal ground for maintaining this petition for *certiorari*.

Petition dismissed.

HIRAM BARRUS & others vs. HARVEY KIRKLAND & others.

Legacies of money, in terms absolute, but immediately followed by an appointment of a trustee to "take and keep the above legacies, the income of which he shall appropriate to their comfort as long as they live; after their decease, what remains I bequeath to him," give the first legatees the right to the income only, although not sufficient for their comfortable support.

BILL IN EQUITY by the four legatees first named in the will of Abby W. Carpenter, and by the guardians of two of them who had become insane, for the application to their support of the principal of their legacies, the income thereof being insufficient for the purpose.

Said will, which was duly proved, contained the following provisions: "1st. I give and bequeath to my sister Sally Whitman of Goshen one thousand dollars." 2d, 3d and 4th. Bequests, in precisely similar words, of two hundred dollars each to her brothers, Samuel Whitman, Ezekiel Cheever and David Whitman. After these four bequests was this clause:

"I hereby appoint Franklin Narramore of Goshen as trustee to take and keep the above legacies, the income of which he shall appropriate to their comfort as long as they live. After their decease, what remains I bequeath to the above trustee."

Then followed bequests, in terms exactly like the above, but without the last clause, of one thousand dollars to another sister, five hundred dollars to a niece, to another sister a feather bed and ten dollars, and specific legacies and bequests of money to many other persons and charitable societies. After which was this article: "19th. I give and bequeath to my sister Sally Whitman all my clothing, linen, silver spoons and jewelry, not previously disposed of"; and a residuary bequest to the Home Missionary Society.

Franklin Narramore died before accepting the above trust and the defendant Kirkland was appointed trustee in his stead. The other defendants were administrators with the will annexed of Mrs. Carpenter. The defendants admitted that the plain-

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tiffs were entitled to the income of their legacies, (subject only to any deduction which the court should deem reasonable for executing the trust,) and that such income was insufficient for their support; but denied their right to any part of the principal of such legacies, and alleged that such principals, after their respective deaths, must be paid to the representatives of Franklin Narramore.

S. T. Spaulding, for the plaintiffs. The principal sums are given absolutely to Sally Whitman, David Whitman, Ezekiel Cheever and Samuel Whitman. "The above legacies," already given, are to be taken and kept by the trustee. A subsequent gift of the principal sums would be repugnant; but there is no such repugnant provision. 1 Jarman on Wills, (3d Amer. ed.) 417. The direction to apply the income annually is consistent with the implied duty to appropriate the principal to the necessary relief of the legatees. The bequest to the trustee of "what remains" implies an indefinite remainder; otherwise the principal sums would have been given *eo nomine* to the trustee. The testatrix did not intend to give to the trustee \$1600, for paying over for a few years less than \$100 annually to her brothers and sister.

Whatever was given to Narramore, was given to him personally, on the condition precedent that he should accept and perform the trust. The bequest to him having therefore failed to vest, the original bequest to her brothers and sister stands unaffected. And the substituted trustee is entitled to the usual compensation only.

C. Delano, for the defendants.

BIGELOW, J. The safe practical rule for the construction of wills, is, that the grammatical and ordinary sense of the words is to be adhered to, unless it would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument. This is the only mode of arriving at the intention of the testator, which is to be ascertained, not by conjecturing what the testator intended to do, but by arriving at the just meaning of the words which he has used. *Grey v. Pearson*, 6 H. L. Cas. 106. *Warburton v. Loveland*, 1 Hudson & Brooke, 648.

The application of this rule to the language of the will, under which the plaintiffs seek to establish an absolute title to the legacies given for their benefit, is fatal to their claims. Indeed the construction for which they contend cannot be supported without entirely disregarding and setting aside an entire clause of the instrument. It is true that, taken by themselves, the bequests to the plaintiffs are in form absolute. But they are immediately followed by a clause appointing a trustee, who is to take and keep the legacies previously given, with explicit directions to appropriate the income arising therefrom for the comfort of the legatees during their respective lives, and, after their decease, the property remaining is given in express terms to the trustee absolutely. These provisions relate to the same subject matter, and, construed together, as they must be, are unambiguous and consistent with each other. The creation of a trust, the direction to pay over income, and the gift of the remainder after the death of the *cestuis que trust*, control the general words of gift to the brothers and sister, previously used, and are inconsistent with absolute bequests to them. Regarding only the language of the will, and confining ourselves to ascertaining the intent of the testatrix, by giving an exact and just meaning to the words used, it is a gift in trust, the income only to be paid to the *cestuis que trust* during their lives in certain designated proportions, with a remainder absolutely to the trustee. In this construction there is no repugnancy or inconsistency, and full effect is given to every part of the bequest, without the change or rejection of a word.

This construction corresponds, too, with the general intent of the testatrix, as gathered from the whole instrument. Her brothers and sister do not all stand on an equality as the objects of her bounty. She has discriminated widely in making bequests to them, in the amount given as well as in the nature of the gift. Nor did she regard them with any greater favor than other persons not of her family or kin, to whom, as well as to the trustee, she has given liberal bequests. And the insertion in another part of the will of a gift to Mrs. Whitman, one of the plaintiffs, absolute in its terms, seems to show that the testatrix

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understood and had in her mind the distinction between an absolute gift and a gift in trust, and leads to the conclusion that the bequest in question was intended to be a limited one only.

Decree accordingly

INHABITANTS OF PELHAM vs. OLNEY P. ALDRICH & another.

A voluntary conveyance of land, made in good faith by a plaintiff pending a personal action, is valid as against a judgment and execution for costs, subsequently recovered therein against him.

WRIT OF ENTRY to recover land in Pelham. At the trial in Hampshire, before *Metcalf, J.*, the demandants claimed title under a levy of an execution against Asahel Aldrich, on a judgment for \$202 recovered against him for costs, in September 1855, in an action which was brought by him against them in December 1852, and tried three times, once in October 1853, again in February 1854, and again in October 1854.

There was evidence that seven days before the second trial of that case, Asahel, "in consideration of love and affection and of one dollar paid," conveyed all his real and personal estate to his two sons, the present tenants, upon condition that they should pay and indemnify him against all debts and demands which he was then liable to pay, and should support him and his wife for life.

The demandants contended that this conveyance was void as against them, 1st. "Because it was upon no adequate consideration; and no consideration in fact having been paid at the time, it was, as against them, a mere voluntary conveyance." 2d. "Because it was made with the fraudulent intent to defeat the prospective payment for costs which they might recover."

This last issue was submitted to the jury. There was evidence that the value of the property at the time of the conveyance was from \$1500 to \$2500; and Asahel testified that he then owed debts to the amount of about \$600; that he sup

posed they had been paid, as he had heard nothing from them since; and that he had no intention of defrauding anybody by the conveyance. Upon this issue the jury found for the tenants: and the presiding judge reported the case for the decision of the full court.

C. Delano, for the demandants. 1. The conveyance from Asahel Aldrich to his sons was strictly voluntary, and therefore, in law, fraudulent and void against "creditors and others," within the *St.* of 13 Eliz. c. 5, as within the mischief, described in the preamble, "to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts, accounts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, not only to the let or hinderance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing." *Clapp v. Leatherbee*, 18 Pick. 138. *Gunn v. Butler*, 18 Pick. 248. *Twyne's case*, 3 Co. 80.

2. The *Sts.* of 13 & 27 Eliz. "cannot receive too liberal a construction, or be too much extended in suppression of fraud." By Lord Mansfield in *Cadogan v. Kennett*, Cowp. 434. The demandants were creditors, or *quasi* creditors, at the time of the conveyance; and are to be viewed as then existing claimants, whose right, though not perfect, was inchoate. If this had been a conveyance by a defendant pending a suit, instead of by a plaintiff, there could be no doubt that it was within the statute; and there is no good reason for protecting one party and not the other. *Rev. Sts. c.* 121, § 1. *Clapp v. Leatherbee*, 18 Pick. 131. *Damon v. Bryant*, 2 Pick. 411. *Sargent v. Salmond*, 27 Maine, 539. The demandants are within the legal signification of the words of the statute. 3 Bl. Com. 399, & app. xii. 3 Reeve's *Hist. Eng. Law*, 400.

At least, as subsequent creditors, they may set aside a conveyance, which was voluntary and void as against creditors existing at the time. *Parkman v. Welch*, 19 Pick. 231. *King v. Wilcox*, 11 Paige, 589.

3. The demandants, as subsequent purchasers for value and in good faith, may treat the prior voluntary conveyance as void within the *St.* of 27 Eliz. c. 4.

I. F. Conkey, for the tenants.

This case was decided at Boston in January 1858.

SHAW, C. J. The construction of the *Sts.* of 13 & 27 Eliz is now well settled, that, if the conveyance is fraudulent, subsequent creditors and purchasers may avail themselves of the fraud to set it aside; but if voluntary only, and made without fraudulent intent, it may be impeached and avoided by those only who were creditors when it was made. *Beal v. Warren*, 2 Gray, 447.

When the grantor in this case made the deed to his sons, (which was upon good consideration, though perhaps not adequate,) he was plaintiff in a suit against the town, and had recovered a verdict. Subsequently the verdict was set aside, and judgment rendered in favor of the town for a large bill of costs, and execution levied on this land.

The jury have found that there was no fraudulent intent in the conveyance. And the court are of opinion that this was not a debt at the time of the conveyance; the debt did not accrue till judgment was rendered against him for costs; the debt having accrued after the conveyance, the demandants in this case were not his creditors at the time of the conveyance, and have no ground in law to avoid it, and the tenants are entitled to

Judgment on the verdict.

JOHN MACK vs. JOHN PARKS.

A watch upon a debtor's person is not liable to attachment, and an officer who, upon its being handed to him by the debtor, merely to be looked at, while still annexed to a silk guard which passes around the debtor's neck, severs the guard and attaches the watch, is a trespasser.

ACTION OF TORT for taking the plaintiff's watch from his person and carrying it away, and converting it to the defendant's use. The question whether the taking was lawful was submitted to the decision of the court upon the following facts:

The defendant was a deputy sheriff and acting in his official capacity at the time of the tort alleged. While the plaintiff and one or two others were in a shop, talking about watches, the defendant came in, and joined in the conversation. In the course of it, the plaintiff took the defendant's watch into his hands to compare its weight with that of his own, and then handed both to the defendant. The defendant then (still holding the plaintiff's watch in his hand) told the plaintiff that he had a writ against him and must attach his watch, and asked him to take it off, it being connected to his person by a silk band which passed about his neck. The plaintiff refused to take it off; upon which the defendant severed the band at the place where it was sewed together, and took the watch; and afterwards, before the beginning of this suit, tendered to the plaintiff the value of the silk band.

D. Granger, for the plaintiff, cited 3 Bl. Com. 8; Rev. Sts. c. 90, § 24; c. 97, § 19; *Collins v. Renison*, Sayer, 139; *Storey v. Robinson*, 6 T. R. 138; *Pierce v. Jackson*, 6 Mass. 244; *Bond v. Ward*, 7 Mass. 123; *Badlam v. Tucker*, 1 Pick. 399; *Ilseley v. Nichols*, 12 Pick. 270.

A. M. Copeland, for the defendant. The only principle upon which the plaintiff could maintain this action is that things in actual use are exempt from attachment — which does not apply to articles of luxury. *Potter v. Hall*, 3 Pick. 373, 374. And as the watch was voluntarily placed by the plaintiff in the defendant's possession, there was no danger of a breach of the peace, which is the only reason given for the exemption of things in actual use. *Simpson v. Hartopp*, & note, 1 Smith's Lead. Cas. 190, 193.

The officer was no more guilty of trespass in this case in breaking the ribbon attached to the plaintiff's watch, than he would be in breaking the inner doors of a house after he had lawfully gained an entrance, or in breaking the lock of a chest after the key had been demanded and refused. But if he were liable, it would be only for the value of the guard tape; and he tendered the plaintiff the value of that before this suit was begun.

This case was decided at Boston in January 1858.

BIGELOW, J. The justification, on which the defendant relies in answer to the trespass alleged in the declaration, depends on the right of a sheriff or other officer to attach on mesne process articles worn on the person of the debtor as part of his dress or apparel at the time the attachment is made, or then in his actual manual possession and use.

We are not aware that any such right has ever before been asserted in this commonwealth. There is no judicial recognition of it, and we are quite sure that there has never been any attempt practically to enforce it. It can hardly be supposed, that the omission to exercise it has been caused by forbearance or ignorance. Creditors are not apt to slumber over their rights, or lose them for want of vigilance, or out of tenderness towards their delinquent debtors. This consideration is entitled to great weight, because we are to seek for the origin and foundation of the right on which the defendant rests his justification, among those well understood and recognized usages and customs, which have become a part of our unwritten law.

By the Rev. Sts. c. 90, § 24, it is provided that all goods and chattels that are liable to be taken on execution may be attached, "except such as, from their nature or situation, have been considered as exempted from attachment, according to the principles of the common law as adopted and practised in this state." Our system of attachment on mesne process was derived from the ancient rule of the common law, by which, as part of the service of civil process, goods which were properly subject to distress were allowed also to be taken by a species of distress, and held as *radii* or pledges to compel the appearance of the defendant. This right was afterwards extended by colonial ordinances, so that the goods taken might be held as security for the judgment which the plaintiff might recover. But, with a few exceptions, the kind of goods lawfully subject to distress or attachment has never been defined by statute, either under the colonial or state government. It must therefore be determined by the common law. *Bond v. Ward*, 7 Mass. 128.

It seems to be perfectly well settled at common law, that

chattels in the actual possession and use of a debtor cannot be taken or distrained. It is laid down in Co. Lit. 47 *a*, that "although it be of valuable property, as a horse, &c., yet when a man or woman is riding on him, or an axe in a man's hand cutting of wood and the like, they are for that time privileged and cannot be distrained." So "if nets are in the hands of a man, they cannot be distrained any more than a horse on which a man is." Hargrave's note (294). *S. P. Read v. Burley*, Cro. Eliz. 539, 596. In the leading case of *Simpson v. Hartopp*, Willes, 512, which Mr. Justice Buller says (4 T. R. 568) is "of great authority, because it was twice argued at the bar, and Lord Chief Justice Willes took infinite pains to trace with accuracy those things which are privileged from distress," it is distinctly adjudged that things in actual use cannot be taken or distrained; and the reason given is, that an attempt to distrain such articles would lead to a breach of the peace. In the modern case of *Sunbolf v. Alford*, 3 M. & W. 253, it is laid down as well settled law, that "goods in the actual possession and use of the debtor cannot be distrained"; "a man's clothes cannot be taken off his back in execution of a *feri facias*." The main ground on which these and other authorities rest is, that it would tend directly to a collision and breach of the peace, if articles thus situated were allowed to be taken from the hands of a debtor. *Gorton v. Falkner*, 4 T. R. 565. *Storey v. Robinson*, 6 T. R. 139. *Adames v. Field*, 12 Ad. & El. 649, and 4 P. & Dav. 504. Com. Dig. Distress, C. Gilbert on Distresses, 43. There are many articles of personal property, subject to attachment under our laws and usages, which could not have been distrained or taken at common law under the rule as stated in the earliest authorities. *Potter v. Hall*, 3 Pick. 368. But in the absence of any proof of usage or custom in this state, from which it might be inferred that a different rule of law has ever been adopted, the present case falls within the principles on which the English authorities rest, and must be governed by them.

The watch, at the time it was taken by the defendant, was in the plaintiff's actual possession and use, worn as part of his

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dress or apparel, and was severed from his person by force. Such an act, if permitted, would tend quite as directly to a breach of the peace as to take from a man the horse on which he was riding, or the axe with which he was felling a tree. It is indeed a more gross violation of the sanctity of the person, and tends to a greater aggravation of the feelings of the debtor. Nor would it be practicable to place any limit to the exercise of such a right. If allowed at all, it must extend to every article of value usually worn or carried about the person; if an officer can sever a silken cord, he may likewise break a metallic chain; if he can seize and take a watch, so he may wrest a breastpin or earring from the person, or thrust his hand into the pocket and carry off money; he may, in short, resort to any act of force necessary to enable him to attach property in the personal custody of the debtor. It is obvious that such a doctrine would lead to consequences most dangerous to the good order and peace of society.

It is no answer to this action, that the defendant tendered to the plaintiff the value of the cord by which the watch was attached to the person, or that the watch itself, detached from the person, was subject to attachment. The wrong consists in having taken an article from the person of the plaintiff, which was at the time by law exempted from attachment. The mode in which it was done is wholly immaterial. He is liable for the value of the watch, being a trespasser *ab initio*. "No lawful thing, founded on a wrongful act, can be supported." *Luttin v. Benin*, 11 Mod. 50. *Ilsey v. Nichols*, 12 Pick. 270. The watch, although liable to attachment if it had been taken by the defendant when not connected with the person of the plaintiff, was wrongfully seized and cannot now be held under the attachment.

Judgment for the plaintiff.

THOMAS TIMOTHY vs. ANSEL WRIGHT.

A release by a convict imprisoned for unlawfully selling intoxicating liquors, which have been seized and destroyed under a statute the constitutionality of which is doubted, of all claims for damages against the magistrates, officers and others who ordered and executed such seizure and destruction, made in consideration of an agreement of third persons to render all necessary and proper services fairly to bring before the governor and council an application for his pardon, and delivered as his deed to another person, to be by him kept until the arrival of the pardon, and then delivered to the releasees, cannot be revoked; but upon the performance of the agreement, and the arrival of the pardon, takes effect as from the first delivery; and is not contrary to public policy.

ACTION OF TORT for breaking and entering the plaintiff's close in Northampton, and taking and carrying away intoxicating liquors and the vessels containing them.

Answer, a release under seal, dated August 7th 1854, which recited the seizure and destruction of said liquors by order of a justice of the peace, pursuant to St. 1852, c. 322, § 14, and that doubts had arisen as to the constitutionality of that statute; and proceeded thus: "Now therefore, for the quieting of all claims and demands for any damages or injuries by me sustained, by virtue of any entry on my premises or other acts in the seizure of said liquors belonging to me or in my possession, or their destruction as aforesaid, in consideration of one dollar to me paid by" the said magistrate, the complainants on whose complaint he acted, and the officers, of whom this defendant was one, who executed his orders, "the receipt whereof I do hereby acknowledge, I do hereby fully release and discharge them, and each of them, of and from all damages, injuries, costs, suits, charges and claims for, on account of, or by reason of any of the said seizures of liquors, or entry into my premises for the seizure or search for liquors therein, or for any other act or acts done by them, or either of them in the premises, in such entries, seizures, or the destruction of said liquors as aforesaid; intending hereby fully to release and acquit and discharge the said party, and each of them, of and from all claims and demands, suits, charges, injuries and costs, in any manner connected with, or relating to, said entries into premises occupied by me, or the seizure or de

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struction of any liquors belonging to me or in my possession, from the beginning of the world to this date."

At the trial in the court of common pleas in Hampshire, at June term 1857, before *Morris, J.*, the defendant produced and offered in evidence the release, and called Samuel Wells, an attesting witness, to prove its execution.

His testimony tended to show "that while Timothy was confined in the house of correction in Northampton, under a conviction for selling liquors contrary to law, he sent for the witness to come and see him; that the witness went and found Timothy apparently much out of health, and desirous on that account of obtaining a pardon; that he told Timothy that if he would promise to abstain from selling liquors, and would release all claim for damages upon those concerned in the seizure, people would be willing 'to interest themselves' for him; that at Timothy's request the witness prepared the release in question, and Timothy signed it in his presence, and requested him to take it and give it to Rev. John P. Hubbard, to be kept until Timothy got his pardon, and then given to the defendant; that shortly afterwards, and in consequence of Timothy's having signed said release, the witness prepared on Timothy's behalf an application to the governor and council for a pardon, intended also for signature by any who might be willing to sign it."

There was also evidence tending to show that the defendant carried the application for a pardon to Hubbard, and Hubbard and others interested themselves to obtain the pardon, and the application was laid before the governor and council; that it was the expectation of Timothy and those who interested themselves in his behalf, that the pardon would be obtained in a few days, but that it did not, in fact, arrive for about two months, and only three weeks before the expiration of his sentence; and that about a week before it came, Timothy said to Wells and to Hubbard, that the pardon had been delayed so long, that he should not stand by the release; and, after his discharge from imprisonment, requested Hubbard not to give the release to the defendant, but to give it to him.

Hubbard testified that he, having previously spoken with

Timothy in prison on the subject, received the release from Wells with a note stating that if a pardon should be received the release was to be delivered to the defendant, if not, to Timothy; but "nothing was said about time as conditional"; that he received no instructions except from Timothy and Wells; that he kept the release until a week before the trial, and then, upon receiving, while absent, a notice that it would be needed on this trial, sent instructions that it should be given to the defendant to be handed to the court; and that he knew no reason why it should not be delivered to the defendant. There was other conflicting evidence as to the instructions given by Hubbard for the delivery of the paper.

There was no evidence that any communication ever passed between the defendant or the other releasees and Timothy on the subject of the release before its execution; but the defendant relied on the above evidence as tending to show that said Wells and others not named in the release were acting for the benefit of the defendant, and that the defendant immediately after the preparation of the release was rendering services in furtherance of Timothy's pardon.

The plaintiff requested the court to instruct the jury as follows: "1st. That inasmuch as there was no consideration for the release, and no agreement between the defendant, or any of the parties affected, and Timothy, for such a release, it was inoperative, and the defendant acquired no right to it until it should be actually delivered. 2d. That, to constitute such a delivery, it must be made for the purpose of giving it effect as Timothy's deed. 3d. That sending to have it put into the defendant's hands, under all the circumstances and in the manner disclosed by the evidence, was not such a delivery as entitled the defendant to avail himself of it for his defence."

The court gave the second instruction requested; but instead of the first and third, instructed them as follows: "If the release was executed by the plaintiff spontaneously, without any consideration therefor, merely as an act of favor to the releasees, he might revoke it at any time before delivery; and if he put it into the hands of Hubbard merely for safe keeping until a pardon

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should be received, and then to be delivered to the defendant, and before it had been in fact delivered the plaintiff forbade its delivery, then it would be legally inoperative, although in the hands of the defendant. If, on the other hand, the execution of this paper and its delivery into the hands of Hubbard were in pursuance of an arrangement between the plaintiff and the other parties acting in behalf of the defendant and others, under which the plaintiff was to receive benefits as well as confer them, under which they were to do something for him, in return for which he was to release the defendant and others, and the defendant and those who acted with him performed their part, then the plaintiff could not revoke or rescind the release, but when the pardon should be received, the defendant would be entitled to have the release delivered to him, and any notice given by the plaintiff to Hubbard not to deliver it to the defendant, or any demand to have it redelivered to himself, would not prevent its taking effect as a release when subsequently delivered to the defendant."

The court further instructed the jury "that it was for them to determine upon the evidence whether an effectual delivery of the instrument had been made; that if they should find that the release had been executed and put into Hubbard's hands under a mutual arrangement as before stated, and the time had arrived, or the contingency had happened, upon which the defendant was entitled to have the release delivered to him, and in point of fact it had been given to him by Hubbard, or with his consent, it would be competent for them to infer that it was delivered in pursuance of said arrangement, unless the evidence repelled such inference; and if so delivered, the defendant might properly avail himself of it in his defence."

The defendant thereupon requested the court to instruct the jury: "1st. That the evidence would not justify the jury in finding any agreement on the part of the defendant or the others named as releasees, unless it be an agreement for the procurement of a pardon. 2d. That such an agreement would be against the policy of the law and void. 3d. That without such a legal agreement, the deposit with Hubbard would not give

any right or interest in the instrument to the defendant, and Timothy could revoke the authority to deliver at any time before the delivery was actually made, or at least before the contingency happened."

The court declined to instruct the jury according to the first of these propositions, but left it to the jury to determine upon the evidence what were the terms of the agreement referred to; and upon the second and third propositions instructed the jury, "that if the agreement was an absolute one, that the persons named in the release, or those acting in their behalf, should procure a pardon, or should procure signatures to an application for a pardon, it would be contrary to the policy of the law and void, and from it the defendant could derive no right or interest in the release; but if the agreement was, as contended by the defendants, merely an undertaking to render such services as were necessary and proper to be done in order to have the plaintiff's application for a pardon fairly brought before the governor and council, it would be valid, and the performance of such services, as the consideration of the release, would not make its execution and delivery void, or authorize the plaintiff to revoke it; that of the description of services or acts which might properly be done would be the preparing of an application for a pardon, or any other papers having reference to that object, the circulating of such a paper for the free and voluntary signature of persons disposed to sign it, care and attention necessary for securing the transmission of the proper papers to the governor and council, making such provisions as are usual and proper to have the case fairly presented to them. Acts and services of this kind, which the plaintiff, being in prison, could not personally perform, might well be done for him by others; and an agreement to perform them, or any of them, would be a valid agreement, there being no absolute undertaking to procure a pardon, nor to procure signatures to a petition for a pardon; and that such an agreement, made and performed by the defendant, or those acting in his behalf, would give him such an interest in the release executed by the plaintiff, and deposited in the hands of Hubbard in pursuance of it, for the benefit of the parties

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concerned, that the plaintiff had no right to revoke it, and his attempt to do so had no effect upon the subsequent delivery."

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

J. Wells, for the plaintiff, cited *Norman v. Cole*, 3 Esp. R. 253; *Hatzfield v. Gulden*, 7 Watts, 152; *Marshall v. Baltimore & Ohio Railroad*, 16 How. 314; *Fuller v. Dame*, 18 Pick. 472; Chit. Con. (8th Amer. ed.) 583.

C. Delano, for the defendant.

This case was decided at Boston in June 1858.

SHAW, C. J. It appears to the court that these instructions were correct. The release was under seal, and therefore imported a consideration. The only question of law, if the release was valid, was, whether it was delivered; and upon the evidence we can entertain no doubt that it was.

There is no pretence that this release was delivered to Hubbard as an escrow, to take effect only as the releasor's deed, upon a future delivery by the depositary to the releasee. The delivery was absolute as the releasor's deed, to take effect upon a contingency; but when the contingency happened, it became absolute as the releasor's deed, by relation, as from the first delivery, and it was not in the releasor's power to revoke or in any way recall it. This point, we think, is settled upon well established authorities, which might be much multiplied. *Wheelwright v. Wheelwright*, 2 Mass. 447. *Foster v. Mansfield*, 3 Met. 412.

The condition on which the release was to be delivered by Hubbard, as the releasor's deed, was not that the pardon should be determined within any time specified. All the releasees and other friends could do, was to take the proper measures for procuring a pardon; the time within which it should be done must necessarily depend on other parties. The release became absolute, and, by the terms on which it was deposited with Hubbard, was to be delivered by him, as soon as the pardon should be obtained.

It appears to us, that the only serious ground upon which the validity of this release can be called in question is, that it is against public policy for individuals to use their right and

power as citizens to petition for a pardon for a convict, upon any pecuniary or valuable consideration. But, after all, this must depend upon the circumstances of the particular case. We can easily conceive of a case where a promise by a convict, to a person supposed to have some influence with the executive, to pay money for the exercise of such influence in obtaining a pardon, would be void in point of law, as contrary to public policy, and to fair and upright dealing in public affairs.

But what are the circumstances of this case? The release itself shows, that the liquors had been seized and destroyed, under a judicial decision, as a legal penalty against the releasor; but that doubts had arisen whether that law was constitutional. If it was not, then he might have a suit for damages against the magistrates, the complainants, the executive officers, who actually executed the judgment and destroyed the liquors. The purpose of this release was to quiet their claims for extreme damages. But at the same time that the liquors were adjudged to be destroyed as a penalty for a violation of law, by force of the same law he was subjected to a personal penalty by imprisonment. Now it seems to us that it would be right and fit for those who were acquainted with all these circumstances, on being satisfied that the convict would relinquish this extreme claim for pure damages against those who acted, as they supposed, under the justification of the law, and in conformity with their duty, to apply to the executive to pardon the convict from the whole or part of the personal penalty; and that it would not be wrong or against public policy for the executive to receive and take such representations into consideration, in the exercise of his high prerogative.

Exceptions overruled.

AMHERST AND BELCHERTOWN RAILROAD COMPANY vs. OLIVER WATSON.

A plaintiff cannot be nonsuited under *St.* 1852, c. 312, §§ 61-72, for insufficiency of answers, which substantially meet all the interrogatories of the adverse party, unless he has refused to comply with an order of the court pointing out the insufficiencies, and directing further answers.

A party to an action may make one answer to several interrogatories of the adverse party, to each of which it is responsive, notwithstanding the provision of *St.* 1852, c. 312, § 67, that "each interrogatory shall be answered separately and fully."

One party cannot, as of right, and without a specific order of court, require the other to produce all his books and papers in answer to interrogatories under *St.* 1852, c. 312, §§ 61-72.

ACTION OF CONTRACT by a railroad corporation on the *Rev. Sts. c. 39, § 53*, to recover a deficiency of assessments, after selling the defendant's shares for payment of the same. A demurrer filed by the defendant was overruled, and the case remitted to the court of common pleas. 4 Gray, 61. The defendant then answered, denying the validity of the assessment, and the regularity of the plaintiffs' proceedings, in various particulars which he pointed out.

He also filed interrogatories, under *St.* 1852, c. 312, §§ 61-72, to Edward Dickinson, one of the plaintiffs' directors, and to John S. Adams, their treasurer and clerk.

Dickinson answered some of the interrogatories to him, and declined to answer others, on the ground that they related to matters not in issue upon the pleadings. The court then passed a general order that he should make further answers; and he accordingly made additional answers upon the several matters inquired of, (a particular statement of which is not necessary to the understanding of the questions of law decided,) in some instances, however, making a single answer to several interrogatories upon one subject.

Adams declined to comply with a request, contained in one of the interrogatories to him, to file with the clerk of the court the records, documents and papers in his possession, belonging to the plaintiffs, and inquired for by the defendant; or otherwise to exhibit them to the defendant's inspection, except by order and under direction of the court.

The defendant moved for a nonsuit, for the failure of the plaintiffs' officers fully to answer the interrogatories. Upon the hearing on this motion, the plaintiffs' counsel stated that said director would, if desired by the defendant's counsel, add to his answers an affidavit that they contained all that he knew upon the matters inquired of; and that the treasurer was willing to exhibit to the defendant's counsel, at any time, at the office of the corporation, their books and papers, and to give all the information in his power in relation thereto. But the defendant insisted on his motion for a nonsuit, and *Morris, J.* granted it. The plaintiffs alleged exceptions.

E. Dickinson, for the plaintiffs.

S. T. Spaulding, for the defendant, compared the interrogatories and answers, and argued that the plaintiffs were rightly nonsuited,

1st. Because Dickinson had not answered the interrogatories to him, as he was bound to do by *St. 1852, c. 312, §§ 61, 63, 66, 67, 72*; and especially had not answered "each interrogatory separately and fully," as required by § 67.

2d. Because Adams had refused to file the records and documents asked for by the interrogatories, as he should have done, under §§ 61, 68.

THOMAS, J. There was, in our judgment, no sufficient ground for the nonsuit of the plaintiff.

1. The amended answers of Mr. Dickinson, one of the plaintiffs' directors, indicate to us no purpose on his part of avoiding his duty. They are substantial answers to all the interrogatories put. If the defendant objected to any of the answers as not full and clear, he should have filed his motion, setting forth his objections to the answers, and praying that they should be made more full and clear. Upon the consideration of such motion and inspection of the answers, the presiding judge must determine and direct which of the interrogatories require further and fuller answers. And for the refusal or neglect of the party to make such further and fuller answers, a nonsuit or default may be entered. *St. 1852, c. 312, §§ 70-72*. It would expose parties to great peril if, after a general order to make further

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answers, and a compliance with such order in good faith, they could be nonsuited or defaulted because some imperfection could still be discovered in some of the answers made.

2. As to the answers of the treasurer and clerk, we are of opinion that the practice act gave to the defendant no such power over the books and papers of the plaintiff corporation as is claimed in his interrogatories and request to the clerk and treasurer. When this officer submitted himself to the direction of the court, the defendant should have applied to the presiding judge for an order to inspect the books and papers of the corporation.

Exceptions sustained.

ISAAC T. SHELDON & another, Administrators, vs. HARVEY
KIRKLAND.

An inhabitant of this commonwealth died, leaving a widow and infant son, real and personal property in Massachusetts, and personal property in Wisconsin. Administration was taken out in each state, and the administrator in Wisconsin duly collected the property there, and, after the death of the widow, and on the supposition that no part of it would be needed in the settlement of the estate of either parent, invested it in Wisconsin, in the name of the son, and transferred it, pursuant to a judicial decree in Wisconsin, to the son's guardian in this commonwealth. The estates of both parents proving insolvent, it was *held*, that the administrator in this commonwealth might maintain a bill in equity here, (making the administrator of the widow's estate a party,) against the guardian of the son to compel the application of the property so received by him to the payment of the debts of the father, and of the distributive share of the widow.

THOMAS, J. This is a suit in equity, submitted to us upon the bill and answer and an agreed statement of facts. The material facts are these :

The plaintiffs, Isaac T. Sheldon and Richard T. Morton, are the administrators of the goods and estate of Theodore Sheldon, late of Northampton, deceased. Theodore Sheldon died at Northampton in March 1852. He left a widow, Mary T. Sheldon, and two children, Isaac T. Sheldon, then six years old, and Dorcas Sheldon, then two years of age, both children by his said wife. The daughter, Dorcas, died on or about the 15th of December 1854, and no administration has been taken on her

estate. The widow died after Dorcas, and on or about the 21st of December 1854. On the 3d of April 1855, the defendant, Kirkland, was appointed special administrator of her estate, and continued in the execution of that office till the 3d of June 1856, when full administration was granted to James L. Hartwell. The defendant was appointed, by the probate court in Hampshire county, guardian of Isaac T. Sheldon, Isaac then having his domicil in this county.

Theodore Sheldon died seised of real estate in this commonwealth of about ten thousand dollars in value, and of personal property of the value of about fifty six thousand dollars. Of this personal property about twenty thousand dollars consisted of notes secured by mortgages of real estate in the county of Kenosha in the State of Wisconsin. The notes were due from residents in that state, and were in the hands of an agent of said Theodore at the time of his decease, and were not inventoried and did not come into the hands of the plaintiffs to be administered by them. Richard T. Morton, one of the plaintiffs, went to Wisconsin, and was there appointed administrator of the estate of said Theodore by the county judge of Kenosha county, having jurisdiction therefor. As such administrator he proceeded to collect said notes and to foreclose the mortgages, by selling the mortgaged estate according to the laws of Wisconsin. For them he got other notes and mortgages to the amount of about seventeen thousand dollars. These notes and mortgages he took in the name of, and made payable to, Isaac T. Sheldon; it then being supposed that no portion of them would be needed in the settlement of the estate of said Theodore Sheldon, of the assets of which they were a part, or in the settlement of the estate of said Mary T., which would be entitled to a distributive share of one third of such assets upon the settlement of the estate of Theodore and after the payment of his debts.

The settlement of the estate of Theodore Sheldon, in Wisconsin, being delayed by the question whether the domicil of Mary T., at the time of her death, and the domicil of Isaac T. Sheldon, were in Wisconsin or Massachusetts, Richard T. Morton, the administrator in Wisconsin, deposited the notes and mort-

gages he had received in the settlement of the debts due the estate of Theodore in the hands of the county judge of Kenosha; the said judge accepting them "in account as money upon his final settlement with the court as administrator." It was afterwards determined that the domicil of Mary T. and Isaac was in Massachusetts.

While these securities were in the hands of the judge, the legislature of Wisconsin, on the 31st of March 1856, passed the following statute, to take effect on the same day :

"SECTION 1. In all cases where any guardian and his ward may both be nonresidents of this state, and such ward may be entitled to personal property of any description in this state, such guardian, on producing satisfactory proof to the county court of the proper county, by certificates according to the act of congress in such cases, that he has been duly appointed, and has as guardian given bond and security, in the state in which he and his ward reside, in double the amount of the value of the property, and it is found that a removal of the property will not conflict with the terms of limitation attending the right or title by which the ward owns or holds the same, then any guardian may demand or sue for, and remove any such property to the place of residence of himself and ward.

"SECTION 2. When such nonresident guardian shall present an exemplified copy, under the seal of the proper court in the state of his residence, of all the entries on record in relation to his appointment, giving bond, &c., and authenticated as required by the act of congress aforesaid, the county court of the proper county in this state may make suitable orders, discharging any resident guardian, executor or administrator, and authorizing the delivery and passing over of such property to such nonresident guardian, and also requiring receipts to be passed and filed, if deemed advisable: provided, that in all cases thirty days' notice shall be given to the resident guardian, executor or administrator, of the intended application for the order of removal; and the court may reject the application and refuse such order whenever it is satisfied it is for the interest of the ward that such removal shall not take place."

On the 14th of November 1856, the county judge of Kenosha, on the application of the defendant, made an order authorizing the passing over of the notes and mortgages to the defendant, as the nonresident guardian of Isaac T. Notice of this application was given by personal service on Richard T. Morton in Massachusetts. No notice was given to the administrator of the estate of Mary T., the widow.

Subsequently, in May 1857, Richard T. Morton settled an account in the probate court, (that is, the Kenosha county court,) and a balance of fifty five hundred dollars being found in his hands, he was ordered to pay the same to the administrators of the estate of Theodore Sheldon in Massachusetts. As one of the administrators of the estate in this commonwealth, he filed his receipt for that sum, and was discharged for that amount as administrator in Wisconsin. There is still a balance of about six hundred dollars in the hands of the administrator in Wisconsin.

The estate of the widow, Mary T., without including her right as distributee of her husband's estate, is insufficient to pay funeral expenses and charges of administration. It has been declared insolvent, and claims proved, exceeding two thousand dollars, due to citizens of Massachusetts.

The personal assets in the hands of the administrators of Theodore Sheldon are insufficient to pay the debts due from the estate; and if they cannot receive these funds, they will have to sell real estate for that purpose, and there will of course be no personal estate for distribution.

Upon these facts, it is plain that these notes and mortgages are part of the assets of the estate of Theodore Sheldon for the payment of his debts and expenses of administration; and that the domicil of said Theodore, his widow and Isaac T. being in this commonwealth, the personal property, after the payment of the debts and charges of administration, is to be distributed under the laws of this commonwealth.

It is also plain that these notes and mortgages were taken originally in the name of Isaac T. Sheldon, and were passed over to his guardian, under a misapprehension of the facts and

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by mistake and inadvertence of the parties; and that he cannot, in equity and good conscience, hold them as against these plaintiffs, administrators of Theodore, and representing the interests of the creditors and of the persons entitled under the statute of distribution.

Without inquiring as to the validity of the decrees in Wisconsin, and supposing the legal title to be in the defendant; yet the property he received was trust property for the payment of the debts of the deceased, and for distribution among his heirs; and the defendant took without consideration and with notice of the trust. The beneficial interest in the property was not changed, and he must hold for those who have the equitable interest.

The muniments of the property, the evidences of the debts due, being in the hands of the defendant, a citizen of this state and within the jurisdiction of this court, and the jurisdiction of the courts of Wisconsin as to them having been exhausted, the defendant should be required to transfer to the plaintiffs the entire amount as assets for them to administer. Or, the property having been received by the defendant from the administrator in Wisconsin, and under the order of the court, upon the ground and with the understanding that it would not be necessary for the payment of the debts of Theodore Sheldon, or for the payment of the distributive share to the widow or her legal representatives, and thus being paid and retained in ignorance of the facts and under misapprehension and mistake; to the extent that such funds are necessary to pay the debts of Theodore Sheldon and the debts of the widow, the defendant should be required to pay over to the respective administrators whatever sums may be necessary for that purpose.

Or the case may be put on this ground; that the securities being taken in the name of the defendant's ward, but the consideration moving from the plaintiffs as they were administrators of Theodore Sheldon, an implied trust results in favor of the plaintiffs.

In either view, it would seem that Hartwell, the administrator of Mary T. Sheldon's estate, should have been, and should

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now be, made a party to the bill, that her estate may be bound by the decree.

The order will be — Hartwell having been made a party to the suit—for the defendant to pay over the funds in his hands to the plaintiffs, to be by them administered as the assets of the estate of Theodore Sheldon.

Order accordingly.

W. Allen, Jr. for the plaintiffs.

C. Delano, for the defendant.

GEORGE T. BOND *vs.* JOHN B. FITZPATRICK.

In a suit against the maker of a promissory note by one who took it overdue, as collateral security for a smaller debt, evidence that the plaintiff's assignor, while holding the note, received money towards its payment, the amount of which is not exactly proved, and, after assigning the note to the plaintiff, declared that it was paid, is competent to prevent a recovery of a greater amount than the plaintiff's own debt; and any payments specifically proved to have been made to such assignor, while he held the note, are admissible in further reduction of the amount to be recovered.

ACTION OF CONTRACT upon a promissory note for \$1900, made by the defendant on the 19th of January 1847, payable in two years to George Dwight or order, and by him indorsed in blank. The new trial heretofore ordered (4 Gray, 94) was had in this court at September term 1857 in Hampden before *Thomas, J.*, when the following facts were proved :

The note was given by the defendant, being the Roman Catholic bishop of this diocese, in part payment for a church building and land since occupied by the Catholic Religious Society in Springfield, and was secured by a mortgage of the property. The note and mortgage were assigned by Dwight to the Springfield Institution for Savings on the 12th of April 1847, by the Institution to John J. Doherty on the 1st of October 1850, and by Doherty on the 2d of October 1850 to Ephraim W. Bond, under whom the plaintiff claimed. This last assignment was conditioned to be void if Doherty should pay Bond a promissory

note for \$1000 given to him by Doherty on the 1st of said October.

The defendant resisted payment, on the ground that Doherty, who was the priest and business agent of the said religious society, had, upon his assignment to Bond, received funds from the society for the payment of the note, sufficient to pay the whole or the greater part of it, and therefore could not negotiate it, when overdue, so as to pass to Bond the right to hold and collect it.

The defendant offered evidence that Doherty, having been appointed priest of the parish in 1848, took upon himself the collection of the pew rents, and raised them about fifty per cent. for the declared purpose of paying off the debt of the church; and proved the increased rate of rents, the number of pews, and that they were generally full for two years succeeding the increase. Several witnesses testified that they paid the increased rents for the two years, (the amount of the increase paid by them being \$200,) and that they had seen other persons than those called as witnesses settling their pew rents with Doherty; but could not state the sums paid nor the names of the persons paying. The defendant also proved two collections in the parish by Doherty for the payment of the debt, and proved the payment to him, in this form, of certain specific sums, amounting in all to \$133; and, as evidence tending to prove the extent or amount of these contributions, offered to prove that, after announcing the purpose of the contributions, Doherty went in person through the church, which was very full, and obtained contributions from most of the people, and "had a box piled up with bills and silver;" but did not show any specific sums paid, nor the amount of the whole collections.

The defendant also proved, that, on the Sunday after the 2d of October 1850, Doherty announced from the desk in the church, that "the whole debt was paid off from the church."

The judge excluded the evidence offered, except of definite sums; and instructed the jury, that it was not competent for them to infer the payment to Doherty of any other sum or larger amount towards the payment of the debt than the sums specifi-

cally proved ; and that the evidence of the announcement made by Doherty on the Sunday after the 2d of October was competent to affect the whole excess of the note above the \$1000 due from Doherty to Bond ; but in order to give it such effect, they must be satisfied that the announcement thus made was true.

The jury returned a verdict for the whole amount of the note except the payments specifically proved, and the defendant alleged exceptions.

J. Wells, for the defendant.

W. G. Bates, for the plaintiff.

SHAW, C. J. This case, formerly reported in 4 Gray, 89, again comes before the court, after another trial. The court perceive no occasion to alter or modify any of the opinions therein expressed.

The court then said, substantially, that as Bond, the plaintiff, took this note long after it was overdue, he took it subject to all equities and set-offs, as a note in contemplation of law dishonored. The note had previously come to Doherty, by assignment, though not by indorsement ; still such assignment made him holder of the debt ; and all sums received by him, whilst so holder of the debt, which in equity and by his relation to others he was properly bound to apply to the payment, must be deemed, as against this plaintiff, to be actual payments on the note ; and the declarations of Doherty, whilst he was so holder of the mortgage and debt, were admissible against this plaintiff to prove such payments.

In regard to the subject of damages, we think the directions of the court were not sufficiently explicit, and the verdict for the whole amount of the note was wrong.

It was clearly proved that the plaintiff took this note overdue, and in point of law dishonored ; a note for nearly \$2000, as collateral security for \$1000 only. Having paid value to this amount only, he can recover no more than he has thus paid value for ; unless he would be liable over for the difference between what he has thus paid and the original amount of the note. We cannot perceive that any person can have such claim upon him, except Doherty ; and if Doherty had no such claim,

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then the damage ought at most to have been limited to the \$1000 advanced by Bond and interest.

We think therefore that the jury should have been instructed, that if they were satisfied that, whilst Doherty was the holder of the debt, he had received moneys of the church applicable to the payment of the note, though not shown exactly how much, and after he had assigned the debt to Bond as collateral security, Doherty had declared that the debt of the church, meaning this note of Bishop Fitzpatrick, had been fully paid, it would be strong, perhaps conclusive, proof against Doherty that he had no longer any interest in the note, and could claim no surplus of Bond, so that the amount of the sum advanced by Bond would be the utmost limit of the plaintiff's claim against Fitzpatrick, and a bar to any verdict for damages above that sum.

If the jury should find from the evidence, independent of such declaration of Doherty, that he, whilst proprietor of the note, had received from rents, contributions, and otherwise, specifically proved, an amount, leaving a less amount due on the note than \$1000, such payments would be regular or actual payments in reduction of the note, and the balance only would be the measure of damages.

Exceptions sustained.

ELLEN DOWNING vs. WILLIAM G. PORTER & others.

A search warrant for intoxicating liquors under *St. 1855, c. 215, § 25*, is not invalidated by so misnaming one street in the description of the place where the liquors are kept as to make the application of the whole description impossible, if in other respects the place is described truly, and so as to identify it with the place described in the complaint.

A search warrant under *St. 1855, c. 215, § 25*, sufficiently describes the liquors intended to be seized as "a certain quantity of gin, being about and not exceeding one hundred gallons."

The provision of *St. 1855, c. 215, § 25*, that a search warrant for intoxicating liquors "shall be supported by the oath of the complainant," is complied with by the complainant's making oath to the complaint upon which the warrant is issued.

A search warrant for intoxicating liquors under *St. 1855, c. 215, § 25*, need not direct the complainant to be summoned to appear as a witness at the hearing of the complaint.

ACTION OF TORT for breaking and entering the plaintiff's close in Chicopee, and taking and carrying away a quantity of intoxicating liquors and the vessels containing the same.

The defendant Porter justified as a constable of Chicopee, and the other defendants as his assistants, under a search warrant issued by the police court of Chicopee against the plaintiff, for a violation of *St.* 1855, c. 215, § 25.

At the trial in the court of common pleas, the plaintiff objected to the legality of the warrant, upon several grounds, which are stated in the opinion of the court. *Bishop, J.* ruled that it was illegal; the jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

R. A. Chapman, for the defendants.

G. M. Stearns, for the plaintiff.

DEWEY, J. The questions particularly considered by the court in the present case arise upon the objections taken to the legality of the warrant under which the articles were seized by the defendant Porter as a constable of Chicopee.

1. It is objected to the warrant that it did not require or authorize a search to be made upon the premises upon which the officer entered. The ground of this objection arises from the supposed misdescription of the premises. In the complaint, which is upon the same paper as the warrant, and was put into the officer's hands with the accompanying warrant, the property for which search was to be made is alleged to be kept and deposited "in a certain building, situate on the east side of West Street, in the town of Chicopee, and being the first building south of the building on the corner of School and West Streets, and occupied in part by the said Ellen Downing as a shop." This description is admitted to be correct; but, in the warrant, there is a variance, and, instead of being described as the first building south of the building "on the corner of School and West Streets," it is described as "on the corner of South and West Streets." It is agreed that there is no such locality in Chicopee as the corner of South and West Streets, and it is quite obvious that the place was misdescribed in the warrant in that respect. It was a false demonstration. The further inquiry

is, whether this is fatal to the warrant. Looking at the entire description, we think, if the words "South Street" be rejected as any part of the boundary, enough will remain to designate the place, as it is there described, as "situate on the east side of West Street, and being the first building south of the building on the corner of West Street, and occupied in part by the said Ellen Downing as a shop." We think, without the aid of the description in the complaint, this would authorize a search for property deposited in a building found to correspond in all respects with all these descriptions. We do not mean to say that some aid might not properly be derived from the complaint connected with the warrant, as in the present case; but the place is sufficiently indicated by the warrant, if all the other calls in the description are answered, excepting that of "South Street," and it is made to appear that that was a false description, there being no such street connecting with West Street.

2. It is insisted that the warrant does not properly describe the liquors that were the alleged object of search and seizure. They are described as "a certain quantity of gin, being about and not exceeding one hundred gallons," and so of other liquors. The inquiry is, whether this general form is sufficient? We are aware of the difficulties attending this subject, and the necessity of a designation of the articles to be searched for and seized. But, as it seems to us, such description of those articles is as specific as the circumstances will ordinarily allow. In the case of lottery tickets, a general description of them as such is deemed sufficient. *Commonwealth v. Dana*, 2 Met. 329. In case of a warrant to seize smuggled goods, it is said, in *Sandford v. Nichols*, 13 Mass. 289, a more general description of the articles would be allowed. So far as legislative sanction can add to the authority for this general mode of describing the articles to be searched for, it is found in *St. 1855, c. 397*, prescribing this form to be used in such cases.

3. It is said that § 25 of *St. 1855, c. 215*, requires that "the warrant to be issued shall be supported by the oath or affirmation of the complainant." This provision is fully complied with by the complainant's making oath to the complaint, and nothing

beyond this could have been intended, the issuing of the warrant being solely a matter for the magistrate to perform.

4. It does not invalidate the warrant, in a case like the present, that the officer is not ordered, by the terms of the warrant, to summon the complainants to appear as witnesses at the time and place assigned for a hearing and trial upon such complaint. Such summons may be by a distinct process or in other form proper to secure their attendance. Its omission in the search warrant does not vitiate that. *Exceptions sustained.*

MARY A. MILLER vs. JAMES M. GOODWIN, Administrator, & others.

An additional consideration for a deed, not inconsistent with the consideration expressed therein, may be shown by parol evidence.

A contract made in contemplation of the marriage of the parties, respecting the property of either, to be performed after marriage, may be enforced in equity.

This court had jurisdiction in equity under the Rev. Sts. c. 74, §§ 8, 9, to decree specific performance by the representatives of a deceased husband, of a written agreement, made by him with his intended wife before marriage, in consideration of her past service to him and of the contemplated marriage, to convey land to her, reserving a life estate therein to himself.

BILL IN EQUITY against the administrator and heirs at law of Jesse Miller, for the specific performance of his agreement under seal, dated August 25th 1852, to convey to the plaintiff, within a reasonable time, certain land in Granville, "reserving to himself the use and possession of the same during his natural life, to be her sole and absolute estate, free from all incumbrances whatsoever." The only consideration expressed in the agreement was her past service for him.

The bill alleged that the agreement was made in consideration of such past services, and in consideration that she would marry him; that they were afterwards married on the same day; that he subsequently made a deed of the land to her, which was void by reason of the coverture; and a will devising it to her

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which was void for want of proper attestation; and died seised of the land; and that a conveyance had since been demanded and refused.

The defendants, admitting the other allegations of the bill, denied that the agreement was made in consideration of marriage, or for any other consideration than that expressed therein, and therefore contended that a deed made in accordance with the agreement could not, for want of a proper consideration, operate as a covenant to stand seised, and would consequently be void, as conveying a freehold *in futuro*. They also alleged that the agreement was discharged by the subsequent marriage of the parties; and that the court had no jurisdiction in equity.

The plaintiff offered in evidence the deposition of Orrin S. Case, the attorney who drew the agreement, which, if admissible, proved that the intended marriage was a part of the consideration. The parties submitted the above case to the decision of the full court.

W. G. Bates, for the plaintiff.

C. A. Winchester, for the defendants.

The decision was made at September term 1858.

METCALF, J. Although the only consideration expressed in Jesse Miller's contract with the plaintiff is her past service performed for him, yet an additional consideration, consistent with that which is expressed, may be shown by parol evidence. *Gale v. Coburn*, 18 Pick. 402. *Preble v. Baldwin*, 6 Cush. 553, 557. *Eppes v. Randolph*, 2 Call, 125. 2 Steph. N. P. 1537. 1 Greenl. Ev. § 304. And the deposition of Case shows that the contemplated marriage of the parties was a part of the consideration of this contract.

If the contract had been that the land should be conveyed to the plaintiff after Miller's decease, the subsequent marriage of the parties would not have released nor extinguished it. 1 Dane Ab. 334. *Clark v. Thomson*, Cro. Jac. 571. *Anon.* Lit. R. 32. *Milbourn v. Ewart*, 5 T. R. 381. But a marriage between parties, who have previously made contracts with each other, which are to be performed presently, or during the marriage, releases or extinguishes such contracts. This has been the law

from the time of Edward the fourth. Co. Lit. 264 b. 1 Bl. Com 442. Such contracts, however, when made in contemplation of marriage, and respecting the property of either of the parties, though released or extinguished at law, are held good in equity, and will be enforced by a court of chancery against the heirs of the party in default. *Haymer v. Haymer*, 2 Vent. 343. *Holtham v. Ry'and*, Nels. Ch. 205. *Acton v. Acton*, Pre. Ch. 237, and 2 Vern. 480. *Cannel v. Buckle*, 2 P. W. 242. 1 Sugd. Vend. (7th Amer. ed.) 286. 2 Spence Eq. Jur. 506, 661. 2 Story on Eq. § 1370.

The only question then is, Has the court jurisdiction in equity of this case? And without determining whether the Rev. Sta. c. 81, § 8, confer jurisdiction in a case like this, (where the plaintiff has no remedy at all at law,) we are of opinion that it is conferred by the Rev. Sta. c. 74. By § 8 of that chapter, "when any person, who is bound by a contract in writing to convey any real estate, shall die before making the conveyance, the other party may have a bill in equity, in the supreme judicial court, to enforce the specific performance of the contract by the heirs, devisees, or the executor or administrator of the deceased party." By § 9, "the court shall hear and determine every such case according to the course of proceedings in chancery, and shall make such decree therein as justice and equity shall require." We understand these sections to authorize the court to enforce specific performance, by the heirs, &c. of a deceased person, of a contract made by him for the conveyance of real estate, whenever, according to the rules of equity as administered in a court of chancery, such court would decree specific performance thereof. *Reed v. Whitney*, 7 Gray, 537. That such court would do so in the present case, the authorities above cited conclusively show. A clearer case of justice and equity than this never came before a court. The contract was made on meritorious considerations, and the obligor intended, to the last, substantially to fulfil it. He failed so to do through want of competent legal knowledge or advice; and his heirs or administrator, or both, must now be required to convey the land to the plaintiff, according to the provisions of the Rev. Sta. c. 74 § 10.

Specific performance decreed.

LEVI T. LEATHE VS. BENJAMIN A. BULLARD.

Waiver of a condition in a deed may be proved by parol evidence.

Upon the question of a waiver of a condition of a deed, an auditor admitted evidence of circumstances both before and after its delivery, although the former was particularly objected to; and reported in favor of the waiver. The court submitted his report to the jury with other evidence, and instructions that a waiver might be shown by parol evidence, and that the auditor's report was *prima facie* evidence. *Held*, that no exception could be sustained to this ruling, without showing in the bill of exceptions that specific objection was taken at the trial to the evidence of circumstances which occurred before the delivery of the deed.

The report of an auditor is *prima facie* evidence of the facts found by him, even if he reports the evidence in detail on which his finding is based.

ACTION OF CONTRACT for money received by the defendant to the plaintiff's use. The case was referred to an auditor, who reported that the defendant made a deed of land to the plaintiff upon condition that the plaintiff should pay to the defendant and his wife certain sums monthly for life, and that "this deed is not to take effect until the said Leathe shall have executed a bond to said Bullard with satisfactory sureties in the penal sum of three hundred dollars, to be in force for the term of five years only, conditioned for the faithful performance of all and singular the conditions of this conveyance."

It further appeared to the auditor that such bond was never executed, but that nevertheless the plaintiff entered into possession, and paid the monthly instalments for more than two years, and then ceased to pay them; was ousted by the defendant for this breach of condition; and brought this action to recover back the money paid by him, on the ground that, the precedent condition for giving bond never having been performed, the deed to him was void.

The auditor reported that two questions arose before him: the first, of law, whether parol evidence was admissible to prove a waiver of the condition, and this he referred to the court; the second, of fact, if such evidence was admissible, whether the waiver was proved; and he was of opinion that it was, and stated the evidence in detail, partly of circumstances occurring before

the execution and delivery of the deed, and partly after; and added, "The plaintiff claims as an incidental matter of law, upon the above evidence, that" all that was done before the delivery of the deed "is entirely inoperative and void, whatever might have been its legal effect if made after."

A trial was had in the court of common pleas in Hampden, at March term 1857, before *Morris, J.*, who signed this bill of exceptions: "The case was submitted to the jury on the auditor's report, and other evidence introduced by the plaintiff to the same purport as that introduced before the auditor, with instructions that it was competent for the defendant to prove a waiver of the condition" above quoted, "by parol evidence of the acts and declarations of the parties; and that, under this view of the question of law referred to the court by the auditor, the auditor's report, unless controlled by the evidence introduced at the trial, was *prima facie* evidence for the defendant. Under these instructions the jury rendered a verdict for the defendant. To which instructions the plaintiff excepts."

G. Walker & S. J. Ross, for the plaintiff. 1. Parol evidence is not admissible to prove waiver of a condition in a deed. Even if parol evidence of circumstances tending to show a waiver after the delivery of the deed is admissible, such evidence of circumstances before the delivery is not, and the judge should so have instructed the jury. 1 Greenl. Ev. § 281.

2. The court erred in instructing the jury "that the auditor's report, unless controlled by evidence introduced at the trial, was *prima facie* evidence for the defendant;" for the auditor had reported the evidence in full, and thus brought before the jury the means of correcting his judgment. *Jones v. Stevens*, 5 Met. 377, 378. *Commonwealth v. Cambridge*, 4 Met. 40. *Taunton Iron Co. v. Richmond*, 8 Met. 436.

W. S. Shurtleff, for the defendant.

BIGELOW, J. It was clearly competent to prove a waiver of the condition in the deed by parol evidence of the acts and declarations of the parties. Co. Lit. 218 a. Shep. Touch. 153. 2 Cruise Dig. (Greenl. ed.) tit. 13, c. 2, § 25, note.

The objection, that a part of the evidence admitted by the

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auditor as bearing on the point of waiver was incompetent, because it related to facts and circumstances which occurred before the execution and delivery of the deed, was not raised at the trial. The attention of the court was not called to it, nor was any ruling made upon it. If the plaintiff intended to avail himself of that objection, which he had raised before the auditor, he should have either moved to have the report recommitted to the auditor, or the objectionable portions stricken out; but having failed in any way to raise any question in regard to it at the trial, it is not now open to him on the exceptions. *Howard v. Hayward*, 10 Met. 420. *Holbrook v. Jackson*, 7 Cush. 152-155. It is the more necessary to observe this rule strictly in a case like the present, where, if the objection had been seasonably taken, the defendant might have offered at the trial further evidence on the question of waiver, in lieu of that now objected to, which would not have been open to any exception on the ground of incompetency.

The auditor's report was *prima facie* evidence of the facts found by him. Rev. Sts. c. 96, § 30. *Taunton Iron Co. v. Richmond*, 8 Met. 436. St. 1856, c. 202. *Exceptions overruled.*

JOHN MILLER vs. CLOSSEN PENDLETON.

In an action against a ferryman for the loss of a horse and wagon by his neglect to put up the chain at the end of his boat, he cannot give in evidence a custom at other ferries on the same river to put up the chain at the request of passengers, and not otherwise.

A ferryman's liability to an action for a loss occasioned by his negligence as such is not affected by the Rev. Sts. c. 26, § 5, giving a remedy by action on his bond to the county commissioners.

ACTION OF TORT against a ferryman on the Connecticut River, for the loss of the plaintiff's horse and wagon by the negligence of the defendant's servants while crossing the ferry.

At the trial in the court of common pleas in Hampden, before *Bishop, J.*, the plaintiff introduced evidence tending to show that

there was a chain at the forward end of the boat, which, if it had been fastened up, would have prevented the horse from going overboard. The defendant offered evidence, which was admitted without objection, that his custom was to have the chain put up when passengers requested it, and not otherwise, and that the person in charge of the plaintiff's horse and wagon did not request it. He also offered to prove that it was customary, at other ferries on the Connecticut River, to have a chain, and manage it in a similar way. But this evidence was objected to, and excluded.

The defendant contended that if the plaintiff had any remedy for the injury, it was by an action under Rev. Sta. c. 26, § 5, on the bond given by the defendant to the county commissioners; and that this action could not be maintained. But this objection was overruled. The jury found a verdict for the plaintiff, and the defendant alleged exceptions.

E. W. Bond, for the defendant.

R. A. Chapman, for the plaintiff.

BY THE COURT. 1. The evidence of custom was rightly rejected, for several reasons. It did not tend to prove a general usage, or to prove that the defendant's custom was right in this particular case. The usage sought to be proved would not be a good usage if it prevailed; it would make the safety of the passenger depend upon his own conduct, and not on the care and vigilance of the ferryman. If the putting up of the chain was a reasonable and proper precaution, it ought to be put up by the ferryman, without a request; if it was not, a request would not make it so.

2. No doubt this action will lie. Although a ferryman is licensed, and assumes certain duties, under our statutes, he still holds himself out as a common carrier for hire, and as such is liable for any want of care.

Exceptions overruled.

CORNELIUS ROURKE vs. AMAZIAH BULLENS.

A sale of a hog on credit, to be kept by the vendor until the purchaser shall call for it, and then paid for at its market price according to its then weight, after which the parties go together to the pen where the hog is, and the purchaser directs the vendor to keep it well, who assents, is not a sufficient sale and delivery against a subsequent purchaser.

ACTION OF TORT for converting to the defendant's use a hog belonging to the plaintiff.

At the trial in the court of common pleas in Hampden at March term 1857, before *Morris, J.*, the plaintiff proved that the hog was sold and delivered to him by Ellen Sullivan; but, by arrangement between the parties, was permitted to remain a few days on her premises, whence the defendant took and killed it, and carried it away.

The defendant testified that, before the sale to the plaintiff, Ellen Sullivan, who was then his debtor in a sum exceeding the value of the hog, being at his store in Chicopee, two miles from the place where the hog was, agreed that she should sell the hog to him, and he should give her credit for it, and she should keep it for him until he should see fit to take it, and he should then pay her its market price according to its weight then. The defendant was also permitted, against the plaintiff's objection, to prove that, after the sale to him and before the sale to the plaintiff, the defendant went with her to the pen where the hog was, and saw the hog, and directed her to keep it well, and she said she would do so. There was no other evidence of delivery to the defendant.

The plaintiff, admitting the defendant's evidence to be true, contended that it did not show such a sale and delivery of the hog by Ellen Sullivan to the defendant as would prevent the plaintiff from acquiring a title to it under the subsequent purchase by him; and that the contract of sale between the said Ellen and the defendant was so vague and indefinite in its terms that it would not vest a title to the property in the defendant as against a subsequent *bona fide* purchaser. But the court in-

structed the jury otherwise, and they found a verdict for the defendant. The plaintiff alleged exceptions.

E. W. Bond, for the plaintiff

G. M. Stearns, for the defendant, cited *Chapman v. Searle*, 3 Pick. 33; *Tuxworth v. Moore*, 9 Pick. 347; *Shumway v. Rutter*, 8 Pick. 443; *Boyden v. Moore*, 11 Pick. 362; *Riddle v. Var-num*, 20 Pick. 280; *Macomber v. Parker*, 13 Pick. 175; *Commonwealth v. Kneeland*, 20 Pick. 223; *Farnum v. Davidson*, 3 Cush. 232.

METCALF, J. The court are of opinion, that what passed between the defendant and Ellen Sullivan was not such a delivery, actual, constructive, or symbolical, of the swine, as gave a title to the defendant, which he can maintain against a subsequent *bona fide* purchaser, to whom actual delivery was made. See *Packard v. Wood*, 4 Gray, 307.

Exceptions sustained.

JOHN HOOKER vs. JOSEPH C. PYNCHON & others.

An agreement for the sale of land owned in common, expressed to be executed by all the tenants in common, but in fact executed by and delivered as the deed of some of them only, may be enforced in equity against those, although it provides for the forfeiture of a certain sum as liquidated damages for any breach.

BILL IN EQUITY for the specific performance of articles of agreement expressed to be made between Joseph C. Pynchon, Daniel Pynchon, and William Pynchon, of Springfield, John P. Pynchon, of Cleveland, Ohio, and Thomas W. Bliss and Emily B. Bliss his wife, of Charleston (S. C.), of the first part, and the plaintiff of the second part; and by which "the said parties of the first part," for the consideration of \$1650 to be paid to them on or before a day named, covenant that, upon such payment by the party of the second part, "they will make, execute and deliver to him a good and sufficient deed of warranty, free

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of all incumbrances," of certain real estate in Springfield; and it is provided that either party who shall fail to perform their agreements shall forfeit and pay to the other the sum of \$350 as liquidated damages. This agreement was signed and sealed by all the persons named in it, except Bliss and wife. The four Pynchons were the defendants in this suit.

The bill alleged that the defendants, being seised as tenants in common with Bliss and wife in her right, of the land described, and being desirous of selling and the plaintiff of purchasing the same, the plaintiff executed the agreement, and the defendants also executed it, and one of them, claiming to act as agent of Bliss and wife, and having the care and management of the land, delivered the agreement to the plaintiff as the agreement of the defendants, and at the same time verbally agreed that Bliss and wife would also execute it as soon as they should come into this state, which would be prior to the time fixed for the conveyance.

The bill then alleged that the plaintiff, on or before the day named, tendered to the defendants the sum of \$1650 and interest, and demanded from them a deed, according to the terms of the agreement, and also demanded from them a deed of their interest in the premises; but the defendants refused to execute either, upon payment of the full amount, and wholly refused to execute any deed whatever of the land; and that the plaintiff had always been, and now was, ready to pay said sum to the defendants whenever they would execute a deed conveying to him said premises. The defendants demurred generally.

E. W. Bond, for the defendants. This agreement was a joint agreement of these defendants and Bliss and wife, and did not become operative or binding on those who signed it until it was signed by all of them. *Ward v. Wood*, 15 Pick. 511. *Bean v. Parker*, 17 Mass. 605. *Hubbard v. Knous*, 3 Gray, 567. *Howe v. Peabody*, 2 Gray, 556. As they were tenants in common, it would be impossible to make "a good and sufficient deed, free of all incumbrances," unless executed by all; and it cannot be presumed that it was intended to have any effect until so executed. *Field v. Woodmancy*, 10 Cush. 427.

The court will not order a specific performance, when it would be impossible for the defendants, not owning the whole estate, to comply with the decree.

If the defendants are liable on the agreement, the only remedy of the plaintiff is by action at law for the recovery of the damages therein stipulated.

F. Chamberlin & C. A. Winchester, for the plaintiff.

BY THE COURT. The court are of opinion that the demurrer cannot be sustained. The bill alleges that the agreement was made, executed and delivered by four of the parties, and shows good ground to proceed against the four. Whether a contract is to be deemed joint or several must depend in a great degree upon the nature of the subject matter. Therefore, a contract by more than one person to convey, if their estate is joint, must be deemed joint. But if their estates are several, as those of tenants in common are, it must be deemed a contract to convey each his share.

A bond with a penalty may operate as a covenant to convey; and the stipulation for liquidated damages is no bar to a bill in equity for a specific performance. *Dooly v. Watson*, 1 Gray, 414.

Probably if the parties who have contracted to convey the land are tenants in common, the agreement may be held to require the payment to each of his share of the money. But this is not the proper stage at which to decide upon the particular form of relief.

Demurrer overruled.

CARLETON L. STEBBINS vs. IRA PECK, JR.

An agreement for the use and occupation of land, made on the Lord's day, is void by the Rev. Sts. c. 50; but if the land is subsequently entered upon and occupied, an action will lie for the use and occupation.

ACTION OF CONTRACT for use and occupation. Trial in the court of common pleas in Hampden, at March term 1857.

The plaintiff proved the use and occupation of his land by the defendant. The defendant testified that the use and occupation were under a contract made on the Lord's day; and therefore contended that the plaintiff could not recover. *Morris, J.* instructed the jury that the contract, if made on the Lord's day, was illegal and void; but that this action could be maintained if the defendant entered into the use and occupation of the land, even if he did so under such illegal contract. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

E. W. Bond, for the defendant.

J. G. Allen, for the plaintiff.

DEWEY, J. This case is not affected by the Rev. Sts. c. 50, forbidding unnecessary labor on the Lord's day; for the defendant entered on the land subsequently to the Lord's day, on which the contract was made, and by such subsequent entry and continued occupation created a new liability if no legal contract existed previously. It was either a ratification and adoption of a previous inoperative contract, or was the foundation of a new implied provision to pay for the use of the land what the same was reasonably worth. In either aspect the

Exceptions must be overruled.

GEORGE W. BOYD vs. AUGUSTUS L. SOULE, Administrator.

My indenture, B. agreed to assign one mortgage and a judgment to A., and a mortgage on other land to A., or to any person whom he should designate, in trust for him; and A. covenanted "to reduce the property so conveyed to him into money," and invest the proceeds, and mortgage or pledge them to B. to secure the payment of an annuity to him. B. assigned the first mortgage and judgment to A., and, at A.'s request, assigned the other mortgage to C., who signed a declaration that he held it in trust for A. A. died insolvent, and C. was appointed administrator of his estate, and received the amount of this mortgage from a second mortgagee of the same land. *Held*, that equity would compel C. to apply so much of this amount as was necessary to secure the payment of the annuity to B.

BILL IN EQUITY. The case was set down for hearing on the bill and answer, and was as follows :

The plaintiff made an agreement in writing with James H. Gray, to assign to Gray a mortgage of land in New Jersey, with the debt thereby secured, and also a judgment against Henry W. Adams, and to assign to Gray, or to any person whom he should designate, in trust for him, a mortgage of land in Springfield, made by him to the plaintiff; in consideration of Gray's covenant, "from and after the time of the transfer to him of the mortgages and judgment above mentioned" to pay to the plaintiff for life an annuity of \$400 in quarterly payments, and "so soon as may reasonably be after the conveyances to him from the said Boyd as aforesaid" to "reduce the property so conveyed to him into money," and invest the same in real estate or stocks, to be mortgaged or pledged to the plaintiff to secure the performance of these covenants.

The New Jersey mortgage and the judgment were afterwards transferred to Gray and by him reduced to money, the money invested in real estate, and that mortgaged to the plaintiff. The other mortgage was assigned, at the request of Gray, to the defendant in fee, who, at the same time, signed and sealed a declaration that he held it for and in behalf of Gray.

Gray, after paying one instalment of the annuity, died; the defendant was appointed administrator of his estate, which was

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represented and proved insolvent; and this mortgage was paid by a second mortgagee and the mortgage transferred to him.

H. Vose, for the plaintiff, contended that the money paid in discharge of the mortgage should be held as security for the payment of the annuity to him, and cited *Rev. Sts. c. 74, § 14*; 1 Story on Eq. §§ 61, 532, 533, 534; 2 Story on Eq. §§ 716, 717, 722, 729, 785, 790; *Clark v. Flint*, 22 Pick. 231; *Yancey v. Stone*, 7 Rich. Eq. 16; *Bouvier Law Dict. "Trust"*; *Arms v. Ashley*, 4 Pick. 71; *Safford v. Rantoul*, 12 Pick. 232; *Johnson v. Ames*, 11 Pick. 173; *Root v. Blake*, 14 Pick. 271; *Burnside v. Merrick*, 4 Met. 537; *Cowles v. Whitman*, 10 Conn. 121; *Shibla v. Ely*, 2 Halst. Ch. 181; *Trecothick v. Austin*, 4 Mason, 29.

Soule, pro se, argued that the *Rev. Sts. c. 74, §§ 10-14*, applied only to agreements to convey specific real estate; that Gray's covenants to reduce "the property so conveyed to him into money," and invest the proceeds and mortgage them to the plaintiff, applied only to the mortgage and judgment conveyed to himself, and not to the mortgage conveyed to the defendant to his own use; that the simultaneous declaration of trust was an agreement of the defendant with Gray, to which the plaintiff was not privy; and that the plaintiff, at most, was entitled to no greater part of this mortgage than was necessary to secure the payment of the annuity, after applying the other securities held by the plaintiff.

SHAW, C. J. We are of opinion that, under the contract between Boyd and Gray, the transfer of property from Boyd to Gray was made upon condition that the proceeds should be converted into money, and be specifically invested and pledged in such a manner that they should stand as a security to Boyd for the payment of the annuity for \$400 to Boyd; that Gray took it with an agreement that it should be thus pledged, when realized; that the assignment made by Boyd to Soule, for the use of Gray, being Soule's own mortgage, was made in pursuance of the same agreement and subject to the same condition and trust as the property conveyed directly from Boyd to Soule, and was so made to Soule in trust and for the use of Gray, to avoid the danger of a merger and extinguishment if made directly

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to Gray; that when Gray died, this assignment still remained in Soule, in trust for Gray but also in trust under the original agreement of Gray with Boyd that the proceeds, when realized, should be invested and transferred in security of the annuity; that Soule, being himself assignee of the mortgage, and administrator of Gray, when he received this money from a subsequent mortgagee, took the money in trust; because that construction would best accomplish the purpose of the original agreement, and that he holds it subject to the trust for the plaintiff. But he must so hold it as collateral security only for the payment of the annuity; and therefore, if not all needed for such security to the plaintiff, the residue already in the hands of the defendant as administrator he will hold as assets of the estate.

Decree accordingly.

JOSIAH W. FLAGG vs. PRIMUS P. MASON.

The declarations of an owner of land, not shown to be deceased, as to its boundaries, though made upon the land, are not competent evidence in favor of a person claiming under him.

ACTION OF TORT for breaking and entering the plaintiff's close. Answer, title in the defendant.

At the trial in the court of common pleas in Hampden, at March term 1857, it appeared that the parties owned contiguous lots, the boundary between which was in dispute. The defendant called a witness, who testified that in 1824 a person, whose title the defendant now had, while in possession of the land now owned by the defendant, purchased of the witness a dwelling-house, to be put upon that lot; and went with him upon the land, and showed him where the house was to be placed, and at the same time pointed out the boundaries of the lot.

Morris, J. permitted the witness, against the objection of the plaintiff, to testify what were the monuments thus pointed out.

Loomis, Administrator, v. Wadhams & another.

The verdict was for the defendant, and the plaintiff alleged exceptions.

E. W. Bond & A. L. Soule, for the plaintiff

R. A. Chapman, for the defendant.

BIGELOW, J. The admission of the declarations of third persons, not parties to a suit, in relation to boundaries of land, is an exception to the general rule of law which excludes hear say evidence. The limits of this exception, as understood in this commonwealth, were defined and stated with accuracy in *Daggett v. Shaw*, 5 Met. 223, and have been since steadfastly adhered to. *Bartlett v. Emerson*, 7 Gray, 174. *Ware v. Brookhouse*, 7 Gray, 454. The declarations admitted at the trial of this case do not come within the exception. The decisive objection to their competency is, that it does not appear that the person who made them was deceased. For aught that is shown he was still living, and might have been called as a witness to the nature and extent of his own occupation of the premises in dispute. His statements on the subject to third persons were clearly incompetent evidence.

Exceptions sustained

JACOB LOOMIS, Administrator, vs. HENRY B. WADHAMS & another.

After a general appearance and answer filed in behalf of two defendants, and one trial had without objection to any defect of service or jurisdiction, a defendant who has personally attended at a second trial cannot object that the court, in fact and by the record, has not acquired jurisdiction of his person.

A bond to give to the obligee "within twenty months from this date a good operative deed to five hundred and twenty five acres of land in T., from any land owned by W. at the time of his decease, except such land as may be sold at this date," *it seems*, contains an implied covenant that that amount of W.'s land remains unsold, and is broken if there is no such land at the date of the bond. And if the obligor owns such land at the date of the bond, it is the obligee's right and duty to select that number of acres in such reasonable time before the expiration of the twenty months as will enable the obligor within that time to prepare a deed of the land selected; but the obligee is not limited to a single tract, provided he does not divide more than one tract; nor required to make his selection in such time as to enable the obligor to repurchase lands sold since the date of the bond, or to free the lands from incumbrances, and upon a failure

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to convey any land at all, the measure of damages is the value of such land as the obligee might have selected.

The admission of a party to the record is competent evidence against him, although it relates to the contents of a writing.

ACTION OF CONTRACT against Henry B. Wadhams and Albert Wadhams, upon a bond, made by them to Caleb Loomis, the plaintiff's intestate, dated February 4th 1847, with a penalty of \$1500, and conditioned to "convey to the said Caleb Loomis and Almira his wife, within twenty months from this date, a good operative deed to five hundred and twenty-five acres of land in the State of Texas, from any land owned by Willard Wadhams at the time of his decease, except such land as may be sold at this date, and reserving to" the obligors two tracts by name.

The declaration, after setting forth the bond, alleged that Caleb Loomis, within the twenty months, removed to Texas with his wife and family, and was ready to select the land mentioned in the bond, and to receive a deed thereof, and notified the defendants and their agent accordingly, and requested them to show the said land to him and his wife, that they might make a selection, and to convey the same to them; but the defendants and their agent refused so to do, and denied that there was any such land; "nor could the said Caleb find any such land, and the plaintiff avers that there was no land of said defendants in said Texas from which he could make such selection;" and that the plaintiff afterwards in this commonwealth again demanded of the defendants a deed of said land, and was again refused.

At the trial at September term 1857 of this court in Hampden, before *Thomas, J.*, the defendants objected that the bond did not support the declaration, and moved for a nonsuit, "1st. Because the declaration does not allege that there were lands belonging to the estate of Willard Wadhams at the date of the bond besides those expressly excepted in the instrument, from which a selection and conveyance could be made; 2d. Because it is alleged as a breach of the bond that there were no such lands." These objections were overruled.

It appeared in evidence, that before the date of the bond Willard Wadhams, a brother of the defendants, had died in Texas, seised of eight separate tracts of land there, one of which contained fourteen hundred and seventy six acres, two of twelve hundred and eighty acres each, three of six hundred and forty acres each, one of three hundred and fifty three acres, and one of eighty six and two thirds acres; and administration of his estate with the will annexed had been granted to Kidder Walker, a resident of that state, and was not closed till the 26th of November 1849; and that within a year after the date of the bond the defendants acquired from their brother's heirs the title to a share of said lands, and the right to sell the residue.

The widow of Caleb Loomis, being called as a witness for the plaintiff, testified that in the fall of 1847 she and her husband went to Texas with instructions from the defendants to apply to Walker for a deed of the lands mentioned in the bond; that they did so, and Walker answered that there was no land there of which he could give a deed. She also testified to the admissions of Albert Wadhams, made about the same time, tending to show there were no such lands, though there had been.

The plaintiff introduced the deposition of Orrin Loomis, in which the witness testified that Albert Wadhams, in conversation with him after Caleb had gone to Texas, said that he had just received a letter from Walker, expressing his surprise that he should send on settlers before he had cleared the land, and stating that there were incumbrances to be paid off before a deed could be given. The defendants objected to this part of the deposition, "on the ground that it stated the contents of a letter." But the court admitted it, "as being the statement of one of the defendants upon the subject of the contract."

Before the evidence of the defendants was closed, the defendants' counsel moved that the case be dismissed so far as Albert Wadhams was concerned, on the ground that it appeared by the record, and was the fact, that he had never been served with process; that he had not attended court in person until this trial; that the condition of the record had at that term first become known to his counsel; that they were never authorized to sub-

mit to the jurisdiction in his behalf, and received all their instructions from his brother. But it appearing that the appearance of counsel on the docket had been general, the plea signed generally, and a former trial had without objection, the presiding judge was of opinion that the defendant had submitted himself to the jurisdiction of the court, and waived any defect of service, and therefore overruled the motion.

The judge instructed the jury, "that the bond was a contract that there was land owned by Willard Wadhams, at the time of his decease, and not since sold, and not excepted in the bond, from which a selection of five hundred and twenty five acres could be made, and that if there were no such lands there would be a breach of the bond; that the right of selection and duty of selection were in Caleb Loomis, and that the selection must have been made in such reasonable time before the expiration of the twenty months as would enable the defendants to prepare a deed of the land selected before the expiration of the period; that in making such selection Caleb Loomis was not limited to a single tract, but might in the exercise of a reasonable discretion take two or more parcels, if he could find such, to make up the five hundred and twenty five acres, though he could not divide the different parcels and take a part of one and part of another; that he was not bound to make the selection in such time before the expiration of the twenty months as to enable the defendants to repurchase land which had been sold after the date of the bond, or to free them from incumbrances; and that the measure of damages was the value of five hundred and twenty five acres of the land described in the bond—the value of five hundred and twenty five acres owned by Willard Wadhams at the time of his decease, not sold before the date of the bond, and which Caleb Loomis might have selected under the limitations before expressed."

The jury returned a verdict for \$1627.85, which included interest from the 5th of October 1848, and the defendants alleged exceptions.

G. Ashmun & N. T. Leonard, for the defendants.

W. G. Bates, for the plaintiff.

Loomis, Administrator, v. Wadhams & another.

THOMAS, J. 1. The motion to dismiss the suit so far as it related to Albert Wadhams was rightly overruled.

There had been a general appearance for the defendants, a general answer had been filed, and a previous trial had without objection. The second trial, at which Albert Wadhams was present, had been nearly finished before the motion was made. It came too late. Any defect of service or of jurisdiction, so far as the person of the defendant was concerned, had been waived by his appearance and answer. If the want of jurisdiction had been of the subject matter, it could not have been cured by the appearance of the defendant. The want of jurisdiction as to the person was cured by the defendant's voluntary submission. The distinction is a familiar and sound one.

2. The construction given to the bond in the instructions to the jury was correct. It was a bond to give to Caleb and Almira Loomis, within twenty months from its date, a good operative deed of five hundred and twenty five acres of land in the State of Texas, from any land owned by Willard Wadhams at the time of his decease, excepting such land as might have been sold at the date of the bond, and also two tracts reserved by name.

The implication, that there were at the date of the bond lands from which the five hundred and twenty five acres might be taken, seems to us too plain for discussion. It was the very substance of the contract.

As however the evidence showed that there were in fact lands in Texas of which Willard Wadhams died seised, and which were not sold at the date of the bond, and other than those specially reserved, the question of the existence of the implied covenant became comparatively immaterial.

3. The allegation of the declaration is, that there were no lands from which the plaintiff's intestate could make his selection after his arrival in Texas, within the time limited. The evidence showed that though there had been lands answering to the description of the bond, they had been sold, so that the obligors could not comply with their contract. The declaration does not allege there were no such lands at the date of the bond. This

distinction seems to have been overlooked in the argument of the defendants' counsel.

4. The instructions as to the selection of the five hundred and twenty five acres, upon whom the duty devolved, as to the time when to be made, and as to the method of making up the quantity, are liable to no just exception.

5. It appearing by the evidence that there were parcels of land of which Willard Wadhams died seised, and which had not been sold at the date of the bond, there could be but one rule or measure of damages, and that was the value of such five hundred and twenty five acres as the plaintiff's intestate might have selected under the limitations stated by the presiding judge.

6. The objection to the admission of a portion of the deposition of Orrin Loomis is not tenable. The part objected to is a statement of an admission of a party to the record. "What a party says," observes Mr. Justice Parke, "is evidence against himself, as an admission, whether it relates to the contents of a written paper, or to anything else." *Earle v. Picken*, 5 Car. & P. 542. See also remarks of the same judge and of Lord Abinger in *Slatterie v. Pooley*, 6 M. & W. 668, 669; 1 Greenl. Ev. § 203; and *Smith v. Palmer*, 6 Cush. 520.

Exceptions overruled.



INDIAN ORCHARD CANAL COMPANY vs. BENJAMIN SIKES, JR. & another.

A manufacturing corporation, authorized by their charter to hold real estate, granted land upon condition "that no building or part of any building thereon shall ever be occupied or used for the sale of spirituous liquors." A grantee of their grantee leased parts of the land with buildings thereon to different persons, one of whom sold spirituous liquors in his tenement, without the participation, knowledge or assent of his lessor. *Held*, that this did not entitle the corporation to enter for breach of the condition in their deed.

WRIT OF ENTRY by a corporation established by St. 1837, c. 69, "for the purpose of creating water power and manufacturing machinery" in Springfield, with the powers, privileges,

duties, restrictions and liabilities set forth in the Rev. Sts. cc. 38 & 44, and with authority to hold real estate to the amount of \$100,000, to recover a parcel of land, situated at the corner of Main and Oak Streets in Springfield, and containing about forty eight square rods. The case was tried in this court, and reserved for the judgment of the full court upon the following agreed statement:

“It appeared that the demandants were formerly the owners of the demanded premises, and on the 7th of October 1845 conveyed the same, by their deed of that date, to Willis Phelps, upon the condition expressed in the deed, among others, ‘that no building or part of any building thereon should ever be occupied or used for the sale of spirituous liquors.’ On the same day, Phelps, by his deed of that date, containing a similar provision, conveyed an undivided moiety of the premises to James Brewer, and, on the 20th of March 1846, Phelps and Brewer, by their deed of that date containing a similar condition, conveyed the demanded premises to the tenants in this action. After the premises were conveyed to the tenants, they caused several buildings to be erected on the land, one of which contains shops of various kinds, and tenements for families. In the autumn of 1854 one of these shops was rented to William Shurtleff, who continued to occupy it till the 1st of April following. In the spring of 1854 one of the tenements and a shop in the basement under it were leased to John Doran, who continued to occupy them until his death in February 1855.

“The tenants contended that the demandants had no power or right to annex the said condition to their deed of conveyance to Phelps; because they were not expressly empowered by their charter to make such conditions part of their deed of conveyance. They also objected that the said condition was illegal and void. But both of these objections were overruled.

“The court ruled that if any part of said buildings or said land was used or occupied by Shurtleff or Doran for the sale of spirituous liquor, and if such part of said building was leased by either of the tenants to Doran or Shurtleff, to be used for that purpose, or if the tenants, or either of them, knew that

the said part or parts of said building were used and occupied for the sale of spirituous liquor, or consented thereto, this would constitute a breach of said condition in said deed of the demandants to Phelps, and the demandants would thereupon be entitled to a verdict; but if the parts of said building were not leased either to Shurtleff or Doran for the sale of spirituous liquors, but were leased for other purposes, and if neither of the tenants knew that either Doran or Shurtleff used or occupied any part of said building for the sale of spirituous liquor, or assented to such use or occupation, the use or occupation of said parts of said building by Shurtleff and Doran for such purposes was not such a breach of said condition as would work a forfeiture of the estate of the tenants, and in the latter case the tenants would be entitled to a verdict.

"The jury found specially, under the direction of the court, that the shops leased to Shurtleff and Doran were by them respectively used and occupied, during some portion of the time while they were in possession, for the sale of spirituous liquors; but that no part of said buildings was leased either to Shurtleff or Doran to be used or occupied for the sale of spirituous liquors; and that neither of the tenants in this action ever assented to the use or occupation thereof for such purposes, or had any knowledge that the same was used or occupied for that purpose. Thereupon a verdict, by direction of the court, was returned for the tenants."

This case was argued in writing at Boston in January 1857.

C. A. Winchester, for the tenants. 1. The demandants had no power to annex such a condition to their grant. Created by law, they had no powers except those conferred upon them by law, or incident to their existence. *Perrine v. Chesapeake & Delaware Canal*, 9 How. 172. *Angell & Ames on Corp.* §§ 111, 160, 256, 271. *New York Firemen Ins. Co. v. Ely*, 5 Conn. 560. *Salem Milldam v. Ropes*, 6 Pick. 32. *Beaty v. Knowler*, 4 Pet. 152. U. S. Dig. 1854, Corporation, pl. 10, 11. A corporation cannot exercise the power of creating a forfeiture unless expressly granted *Cotter v. Doty*, 5 Ohio, 395. *Kirk v. Nowill*, 1 T. R. 118.

2. The condition itself is illegal and void; because it is an attempt to create a perpetuity, against the rules of law and the tenor of Massachusetts legislation from the earliest times; because it is against public policy, and in restraint of trade and the beneficial use and free transfer of property; and because it is repugnant to the grant.

3. If the condition is valid, it is to be construed strictly 4 Kent Com. (6th ed.) 129. *Merrifield v. Cobleigh*, 4 Cush. 184. The rights of these tenants cannot be affected by the use made of the premises by others without their knowledge or assent. *Peisch v. Ware*, 4 Cranch, 347. *Emery v. Kempton*, 2 Gray, 257. *Trueman v. Gunpowder*, Thach. C. C. 14.

G. Walker, for the demandants. 1. The Indian Orchard Canal Company had all the powers and privileges in conveying their real estate, which an individual could have, and could annex any lawful conditions to their grants, with the right of enforcing a forfeiture for breach of them. *St.* 1837, c. 69. *Rev. Sts.* c. 44, § 6. *Angell & Ames on Corp.* §§ 148, 166-168. *Canal Bridge v. Methodist Society*, 13 Met. 335. *Boston Water Power Co. v. Boston & Worcester Railroad*, 16 Pick. 512. The forfeiture which was disallowed in 5 Ohio, 395, relied on by the tenants, was an attempt to forfeit, without legal process, property kept in violation of a by-law of a city.

2. The condition is valid. It does not tend to a perpetuity, for it does not "tend to take the subject out of commerce." *Bouvier Law Dict.* "Perpetuity." It is not in restraint of alienation; far less so, indeed, than conveyances of lands for public, religious and charitable purposes, with a condition of forfeiture if otherwise used; yet such conditions have been uniformly recognized and upheld in this commonwealth. *Hayden v. Stoughton*, 5 Pick. 528. *Brigham v. Shattuck*, 10 Pick. 305. *Clapp v. Stoughton*, 10 Pick. 463. *Austin v. Cambridgeport Parish*, 21 Pick. 215. *Canal Bridge v. Methodist Society*, 13 Met. 335. It is within the reasoning, and, except in being unlimited in duration, within the principle, of decisions in cases in this state and New Hampshire. *Gray v. Blanchard*, 8 Pick. 289, 290. *Gillis v. Bailey*, 1 Foster, 149. And the duration

makes no difference. *Tallis v. Tallis*, 1 El. & Bl. 410, 412. *Hitchcock v. Coker*, 6 Ad. & El. 438. It restricts trade and the alienation of property much less than many conditions which have been recognized as valid. *Doe v. Pearson*, 6 East, 172. *Bristow v. Wood*, 1 Collyer, 480. *Doe v. Allen*, 3 Taunt. 78. *Doe v. Carter*, 8 T. R. 57. 2 Sugd. Vend. (7th Amer. ed.) 493, 496. *Barrow v. Richard*, 8 Paige, 351. *Sperry v. Pond*, 5 Ohio, 389. It interferes with no beneficial enjoyment of the property for all uses except one; and that one in itself of immoral tendency, and opposed to the public welfare and to the uniform course of our legislation.

3. The condition is express that the land conveyed shall not be "occupied or used" for the prohibited traffic. It does not apply to a single sale of spirituous liquors, but to the repetition of such sales until they become usual. It extends to the voluntary acts of all persons in lawful occupation of the premises by permission of the owner; though perhaps not to the acts of a stranger. It is not in terms limited to a prohibited occupation or use, with the knowledge or assent of the owner; and such a limited construction would deprive it of any efficacy. The verdict has found the actual existence on the premises of the evil which the condition was intended to prevent.

THE COURT in June 1857 gave *Judgment on the verdict.*

JEFFERSON WHITE vs. MUTUAL FIRE ASSURANCE COMPANY OF SPRINGFIELD AND VICINITY.

A policy of insurance on a "dwelling-house and wood-house," described in the application as "occupied for the usual purposes," covers a building, built at one time, with a single frame and roof, and designed for one building, for a carriage-house and wood-house, of which the wood room constitutes two thirds, and is separated from the carriage room by a loose partition extending to the eaves on one side, and half way to the roof on the other; and does not exclude evidence that the whole building was called by the tenants and neighbors the "wood-house."

In the trial of an action on a policy of insurance upon a building in which was a quantity of straw at the time of the fire, the defendants cannot, "for the purpose of showing the condition of the straw at the time," introduce evidence that three weeks previously a

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bonfire was made by boys outside of the building, with a trail of straw from it to the building, in which loose straw was then lying.

A hog-pen and hen-house, from three and a half to six feet high, covered with boards, with a partition of boards between them, are not a building within the meaning of an application for insurance, which represents that there are no buildings not disclosed within a certain distance; and evidence that they increased the risk is inadmissible.

The insurance of a landlord who uses reasonable care and diligence in the selection of tenants and the management of the premises is not affected by his tenants keeping straw on the premises, without his knowledge or assent, so as to increase the risk.

ACTION OF CONTRACT on a policy of insurance issued in 1853, for six years, on the plaintiff's "brick dwelling-house and wood-house situated in Chicopee," under the conditions and limitations expressed in the by-laws annexed thereto, one of which provided that "if the assured shall alter or enlarge a building or appropriate it to other purposes than those mentioned in the policy, so as to increase the risk, the same shall become *ipso facto* void."

In the application "to which," by the policy, "reference may be had," the property insured was described as in the policy, and as "occupied for the usual purposes, by a tenant"; and the applicant, under the printed head of "Relative situation as to each other and as to other buildings," made this statement: "House and wood-house connected. No other buildings within four rods except the ice-house."

Answer: the existence of a carriage-house adjoining the wood-house, and of other buildings within four rods of the premises, not disclosed in the application; and the use of the premises for keeping straw; all of which increased the risk. Trial in the court of common pleas in Hampden at October term 1856, before *Bishop, J.*, who, after verdict for the defendants, signed a bill of exceptions, of which the material parts were as follows:

"There was evidence that the dwelling-house and wood-house building were built by *Elihu Adams* in 1839; the whole of the wood-house building was built at one time, had but one frame, was all under one roof, and *Adams* testified that it was designed for one building, for a wood-house and carriage-house; the wood room constituted two thirds or more of the entire building, and was separated from the carriage room by a loose partition, about seven feet high, which extended to the eaves on one

side, and not so high on the other side, leaving a distance of about seven feet between the top of the partition and the ridge-pole. There were large cracks and holes between the boards of the partition, through which one might look from one room into the other ; and the carriage room was open on the east side, but the wood room was inclosed on all sides.

‘ It appeared in evidence that in June 1854, at about three o’clock P. M., a fire was discovered in the carriage room, and consumed the wood-house building, damaged the back part of the dwelling-house, and consumed the ice-house, hog-house and hen-house, hereafter mentioned. It also appeared that in the carriage room there were from four hundred to one thousand pounds of straw, which was scattered about and trod down on the ground, there being no floor in the room, and which had been put there without the knowledge or assent of the plaintiff in the fall or winter previous by one Fuller, who then occupied part of the plaintiff’s house, but moved out in the April before the fire, and was succeeded by another tenant. The plaintiff proved that from 1849, when he purchased the premises from Adams, to the time of the fire, no cattle were kept in said carriage room, and no straw, hay or other similar articles were put there, except the straw put there by Fuller, as before stated. The plaintiff resided in Enfield, twelve or fifteen miles from the insured premises, and never personally occupied said premises, but rented them, and visited them from time to time for the purpose of collecting rents and looking after the premises.

“ The plaintiff offered to prove by several witnesses, some of whom had been tenants of the premises, and others near neighbors, that the building in which the wood-house and carriage room were, had always been commonly known and called as the ‘ wood-house.’ But the court rejected the evidence.

“ The defendants called Mrs. Jewett, who testified that she lived nearly opposite the insured premises ; that about three weeks before the fire she saw from her house a bonfire near the carriage-house ; that she went out, and found that the fire was made of straw, and that there was a trail of straw from the carriage-house to the fire ; that she separated the burning from the

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other straw, and put the fire out; that the carriage-house was open, and loose straw was lying there; that her little boy and the child of one of the tenants made the fire. To this evidence the plaintiff objected; but for the purpose of showing the condition of the straw at the time, and for no other purpose, the testimony was admitted.

"It appeared in evidence that in the rear of the building containing the wood room and carriage room, and separated from said building by a passage way three feet wide, was an ice-house, and that in the rear of the ice-house, and distant from it one or two feet, was a small structure, called by some of the witnesses a hog-house and hen-house, being three and a half feet high in the rear, and six feet high in front, and covered by boards, but not shingled or battened, and with a board fence or partition between the hog-house part and the hen-house part. It extended towards the barn and to within about twenty four feet of it."

The defendants were permitted, notwithstanding the plaintiff's objection, to introduce evidence that the hog-house and hen-house increased the risk, and would, if disclosed, have increased the premium.

"The plaintiff contended that, as it appeared from the application that the insured premises were to be occupied by tenants, there was an implied agreement on the part of the defendants that if the plaintiff used reasonable care and diligence in the selection of trustworthy tenants, and in the general management of the premises, the insurance should not be affected by acts done by the tenants without his knowledge or consent; and he asked the court to instruct the jury that, if they were satisfied that the plaintiff used such reasonable care and diligence, and did not assent to or know of Fuller's putting and keeping the straw in the carriage-house, the fact that the straw was thus put and kept there by Fuller would not prevent the plaintiff from recovering, even if the straw being there did increase the risk. But the court declined so to instruct the jury.

"The plaintiff also asked the court to instruct the jury that, as the policy and by-laws nowhere specifically prohibited the

keeping of straw on the premises, it was not a violation of any of the provisions of said policy and by-laws if the plaintiff's tenant did keep said straw there, provided he kept it only in reasonable quantities, and for his own use. But the court declined so to instruct the jury; and instructed them, that if the straw materially increased the risk, it was a violation of the policy, and worked a forfeiture of the plaintiff's claim under it.

"To the foregoing rulings and instructions the plaintiff excepts."

E. W. Bond, for the plaintiff, to the point that the court erred in refusing to give the instructions requested, cited *Indian Orchard Canal Co. v. Sikes*, ante, 562; *Gambell v. Merchants' & Farmers' Mutual Fire Ins. Co.* 11 Cush. 167; *Loud v. Citizens' Mutual Ins. Co.* 2 Gray, 221; *Gates v. Madison County Mutual Ins. Co.* 1 Selden, 469.

F. Chamberlin, (*R. A. Chapman* with him,) for the defendants. 1. The application represented that the property insured was a house and wood-house, "occupied for the usual purposes." The carriage-house was a distinct building, used for a different and more hazardous purpose, which, not being disclosed, avoided the policy. *Rice v. Tower*, 1 Gray, 426. *Webber v. Eastern Railroad*, 2 Met. 147. It was built for a carriage-house, and used for storing straw, which is not a "usual purpose" of a house or wood-house. Evidence that it was sometimes called by neighbors the "wood-house" was inadmissible.

2. Mrs. Jewett's testimony was properly admitted to show for what purpose the carriage room had been used.

3. The representation that there was "no other buildings within four rods" was a material representation, if not a warranty; and the question whether the hog-house and hen-house materially increased the risk, was properly submitted to the jury.

4. The application, while it stipulated that the premises should be used for the "usual purposes," in terms contemplated their occupation by tenants. For the acts of such tenants, paying rent to the plaintiff, and subject to his control, the plaintiff is responsible. *Rice v. Tower*, 1 Gray, 426. *Merriam v. Mid-*

Massachusetts Mutual Fire Ins. Co. 21 Pick. 162. *Jones Manuf. Co. v. Manufacturers' Mutual Fire Ins. Co.* 8 Cush. 82. *Murdoch v. Chenango County Mutual Ins. Co.* 2 Comst. 210. They were not mere trespassers, or occupants for a special purpose under a license which they abused, as in *Loud v. Citizens' Ins. Co.* 2 Gray, 221.

THOMAS, J. 1. The description of the premises in the evidence, fully detailed in the bill of exceptions, very clearly shows that the "wood-house" covered and included the room in which the straw was deposited. We perceive no ground for saying that this room, designed for a carriage room, was a building, so as to make the application false when it stated there was no other building within four rods of the premises insured except the ice-house. But the evidence that the building which covered and included the wood room and carriage room was known and called by the tenants and neighbors the "wood-house," though not necessary, was competent.

2. The evidence of Mrs. Jewett as to the bonfire of straw three weeks before the fire was immaterial, because the fact it tended to prove, and to which its effect was limited by the learned judge, was itself immaterial. From its manifest tendency also, to prejudice the cause of the plaintiff, it should have been excluded.

3. Whether the pig-pen and hen-house were buildings within the terms of the application — "no other buildings within four rods" — would depend upon their size and structure. Upon the evidence given in the bill of exceptions they were not buildings, within the meaning of the application; and evidence as to increase of risk from them was not competent.

4. The instructions prayed for should in form or substance have been given. There was nothing in the acts of the tenant, as proved, which avoided the policy. The instructions given were unsound, for the same reason. *Exceptions sustained.*

WILLIAM L. SMITH vs. LUTHER HILL.

Debts purchased with knowledge of the debtor's insolvency, and reason to believe he is about to go or be driven into insolvency, and notice to the debtor of the purchase, cannot be set off in an action by the assignee in insolvency upon a debt due from the purchaser to the debtor.

ACTION OF CONTRACT by the assignee in insolvency of Francis W. Kibbe, on several promissory notes. The parties stated this case :

On the 13th of November 1855 Kibbe, being a trader in Springfield, in embarrassed circumstances and unable to pay his debts, proposed to the defendant to buy out his stock in trade; and the defendant agreed to do so, and to give his notes therefor, upon condition that they should be placed by Kibbe in the hands of a third party for the equal benefit of his creditors, and in order to avoid any question as to the legality of the sale. The notes in suit were accordingly given, and placed in the hands of an attorney, who accepted the trust; and many of Kibbe's creditors, at the suggestion of Kibbe and the defendant, sent their claims to the attorney to receive their proportion of the proceeds of the notes.

On the 28th of January 1856 Kibbe applied for the benefit of the insolvent laws, and the plaintiff was afterwards appointed his assignee, and obtained these notes from the attorney with whom they had been deposited.

The defendant, after purchasing Kibbe's stock, and before the first publication of notice of the commencement of the proceedings in insolvency, knowing Kibbe to be insolvent, and having reason to believe that he was about to go or be driven into insolvency, purchased and took assignments of sundry debts owing from Kibbe to other persons, at from forty to fifty cents on the dollar; and gave notice to Kibbe of such purchases and assignments.

The defendant claims to be allowed to set off the whole amount of those debts in this action. But the plaintiff denies

his right to set off any part of them, and contends that he can at most set off only the sums actually paid by him.

W. L. Smith, pro se, (G. Walker with him.)

P. C. Bacon, for the defendant. Under the St. of 1838, c. 163, § 3, (which had not been modified by St. 1856, c. 284, § 28, when these transactions took place,) all mutual debts and demands existing at the time of the first publication of notice are to be set off, in whatever form of proceeding the question is presented. *Bemis v. Smith*, 10 Met. 194. *Demmon v. Boylston Bank*, 5 Cush. 194. *Aldrich v. Campbell*, 4 Gray, 286, and cases cited. *Ex parte Blagden*, 19 Ves. 467. *Ex parte Stephens*, 11 Ves. 28. These demands might have been set off at law; for by the Rev. Sts. c. 96, §§ 5, 11, equitable demands assigned, with notice to the debtor before the commencement of an action, may be set off as if originally payable to the assignee. *Commonwealth v. Phoenix Bank*, 11 Met. 136. The defendant was a purchaser for valuable consideration of the debts attempted to be set off, and, being the *bona fide* owner of them at the time of the first publication, could have proved them in insolvency in his own name. The plaintiff stands in no better situation than Kibbe would have stood, had he not applied for the benefit of the insolvent law. *Briggs v. Parkman*, 2 Met. 258. *Mitchell v. Winslow*, 2 Story R. 630. *Mitford v. Mitford*, 9 Ves. 100.

The defendant, owning these debts in his own right, and not under any fraudulent trust, is not deprived of his right of set-off by his knowledge, when he took them, of Kibbe's insolvency, and reason to believe that he was about to go or be driven into insolvency. Sts. 5 G. 2, c. 30, § 28; 46 G. 3, c. 135, § 3; 6 G. 4, c. 16, § 50. Sts. 1838, c. 163, § 3; 1856, c. 284, § 28. *Fair v. M'Iver*, 16 East, 139. *Hawkins v. Whitten*, 10 B. & C. 217. *Lackington v. Combes*, 6 Bing. N. C. 71. *Aldrich v. Campbell*, 4 Gray, 286.

The decision was made at Boston in June 1858.

DEWEY, J. This case discloses a purchase of demands against an insolvent debtor under circumstances that should prevent the purchaser from availing himself of them in set-off against a debt due from him to the insolvent and sought to be

recovered by the assignee of the insolvent for the purposes of general distribution among his creditors. The present case differs from that of *Aldrich v. Campbell*, 4 Gray, 284, where such purchase was made in good faith, and unaccompanied by circumstances tending to show a knowledge that the purchase would operate to defeat the purposes and provisions of the insolvent laws. The whole arrangement made by this defendant in the transactions between him and the insolvent, preceding and connected with the purchase of these demands from creditors of the insolvent, indicates a purpose to interfere with the proper distribution of the estate of the insolvent, and is contrary to the spirit of the insolvent laws.

To allow this set-off would not be consonant with equity or justice to the parties interested; would directly tend to defeat an equitable distribution of the assets among the creditors generally; and would enable a debtor of an insolvent—one notoriously so, and who was about to become the subject of proceedings in insolvency—to give a preference to such creditors of the insolvent as he might be disposed to favor, making their debts available to the whole amount due, if the purchaser pleased to take them at that rate, as he might well do if he was to be allowed their full amount as an available set-off against his own debt to the insolvent; or, what would be equally objectionable, to allow the debtors of the insolvent to discharge their liabilities by a set-off acquired by purchasing the depreciated debts of the insolvent at a large discount from their nominal amount.

The St. of 1856, c. 284, § 28, directly forbidding such a set-off as this, was enacted too late to affect this transaction. But independently of that provision, in our opinion this claim for set-off should be refused.

We do not say that the party holding such demands by purchase from some of the creditors may not properly file the same as debts due from the insolvent, and receive his *pro rata* distributive share of the assets. That would do no injustice to the other creditors.

Set off denied

CHESTER W. CHAPIN vs. VERMONT & MASSACHUSETTS RAILROAD COMPANY.

The holder of a bond issued by a railroad corporation, payable "to ———," and subsequently confirmed by the legislature, may sue thereon in his own name.

A railroad corporation issued bonds payable "to ———," and purporting on their face to be secured by a mortgage of the same date to trustees of all the property of the corporation; and such a mortgage was in fact executed. The legislature afterwards ratified and confirmed "the proceedings" of that date, "whereby said corporation conveyed their said railroad property in mortgage to" certain persons, "trustees for the bondholders in said mortgage mentioned, to secure the holders of said bonds the payment of the same." *Held*, that these bonds were thereby confirmed, and might be sued upon in the name of any holder.

ACTION OF CONTRACT against a railroad corporation established by law in this commonwealth, upon this instrument:

"Secured by a mortgage of the road for the sum of \$1,100,000, made to Robert G. Shaw of Boston, John Davis of Worcester, and Jabez C. Howe of Boston, in trust for the benefit of the bondholders."

"Vermont and Massachusetts Railroad Company. No. 582. Mortgage Bond. Amount \$1000. The Vermont and Massachusetts Railroad Company, for value received, hereby promise to pay to ——— the sum of one thousand dollars, at the office of the treasurer, in the city of Boston, on the first day of July which will be in the year one thousand eight hundred and fifty five; and also interest for the same semi-annually, on the first day of January and July in each and every year after the date hereof, upon the surrender of the corresponding warrant.

"In witness whereof, and pursuant to a [Seal.] vote of the stockholders of said company, passed on the 29th day of June 1849, the president and treasurer have hereunto set their hands and the seal of said corporation, this second day of July 1849.

John Rogers, Treasurer,
Thos. Whittemore, President.

"I hereby certify that this bond is secured by mortgage, dated July 11th 1849. Jabez C. Howe, one of the trustees."

The defendants admitted the signatures and the official

capacities of the signers. And the parties agreed that the instrument declared on and others like it, amounting in all to \$1,100,000, were issued in pursuance of a vote of the stockholders of the defendant corporation, and was secured by mortgage as above stated therein; that the issue of said instruments and the execution of the mortgage therein mentioned were confirmed and legalized by *St. 1850, c. 233*; and that this instrument was sold at or about its date by the defendants at auction, and purchased by some one other than the plaintiff, and came to the plaintiff after one or more transfers by purchase for value in July 1852; and submitted the case to the decision of the court upon these facts.

A. L. Soule, for the plaintiff.

H. C. Hutchins, for the defendants, relied chiefly on the decision of the circuit court of the United States for the first circuit in *White v. Vermont & Massachusetts Railroad*, since reversed by the supreme court of the United States. 21 Law Reporter, 469; 21 How. 575.

MERRICK, J.* There is no doubt but that the instrument declared on in the present action is a bond. And it is a familiar and well settled rule of law, that bonds and other contracts under seal are not, in general, negotiable instruments, the legal interest in which may be transferred from one owner to another by mere delivery, so that an action thereon can be maintained by the assignee in his own name. They may be assigned; but after assignment, as well as before, all actions to recover damages upon the failure of the obligor to perform any stipulated engagements must be brought in the name of the first assignor. 1 Parsons on Con. 196, 240. *Skinner v. Somes*, 14 Mass. 107.

It has, however, been held in some courts that bonds, with coupons, payable to bearer, pass by delivery from hand to hand, and that purchasers of them for good consideration paid may at their maturity maintain actions upon them for the recovery of their contents. *Morris Canal & Banking Co. v.*

* This case was decided, and the subsequent cases, except *Webster v. Munger*, *post*, 584, and *Stone v. White*, *post*, 589, were argued and decided at Boston in January 1858, before all the judges but *Thomas, J.*

Fisher, 1 Stockton, 667. Redfield on Railways, § 239, and cases there cited. And it is specially provided by one of our own statutes that "all bonds and other obligations under seal, for the payment of money, purporting to be payable to the bearer, or to some person designated or bearer, or payable to order, issued by any corporation or joint stock company," shall be negotiable like promissory notes. St. 1852, c. 76.

But the instrument on which the plaintiff declares is anomalous; it does not come under the description contained in the statute. It is not payable to the bearer, or to any designated person, or to the order of any one. No payee is named in it. Yet in all other respects it is a complete and perfect instrument; and a blank space is left, wherein may be written, without interlineation, erasure or defacement, the name of an obligee.

It is agreed by the parties that this bond, together with many others similar to it, amounting in the whole to about the sum of eleven hundred thousand dollars, were sold, at or near the time they bore date, by the defendants at public auction to numerous purchasers. The defendants realized the money for which they were sold, and applied it, partly in payment of pre-existing obligations, and partly in expenditures to carry on and complete the enterprise in which they were then engaged. All these bonds purport upon their face to be secured by a mortgage of the same date made by the defendants of all their railroad property to trustees for that express purpose; which mortgage was in fact duly executed by them. At a subsequent period it was provided by a statute of this commonwealth, under whose authority the defendants hold their charter, that their "proceedings whereby they conveyed, agreeably to a vote of the stockholders passed on the 29th day of June 1849, their said railroad property in mortgage to John Davis, Robert G. Shaw and Jabez C. Howe, trustees for the bondholders in said mortgage mentioned, to secure the holders of said bonds the payment of the same," were thereby ratified and confirmed. St. 1850, c. 233.

The proceedings of the defendant corporation, mentioned in the statute, included as well the contracting of the debts and the issuing of their bonds therefor, as the execution of the mort-

gage. Indeed, as in other instances when property is pledged for security, the debt must have been considered the principal thing to be protected, and the mortgage only as collateral to the general purpose. Hence it is obvious that it was these various contracts of indebtedness, into which the defendants had entered, which it was the object and purpose of the legislature to ratify and confirm. In issuing so large a number of bonds, each of them payable at a future and distant period, it is impossible to suppose that the defendants intended or expected that they should all remain in possession and ownership of the original purchasers. It could not but have been foreseen that many of them would necessarily and frequently change hands many times before they should become due; yet it was plainly the intention of the corporation to make themselves debtors to every person by whom any of the bonds should be then justly holden. It is therefore fairly to be presumed, and indeed it is an unavoidable implication from all their proceedings, that they consented that any *bona fide* holder of one or more of these bonds, for value, might perfect the contract by inserting at his own pleasure his name as obligee of the bond in the blank space which had been left in it for that purpose. And this is undoubtedly one of the things which it was the object and design of the statute to ratify and confirm. It could not have escaped the attention of the legislature, of the bondholders, or of the defendants, that something of this kind was indispensable to make the creditors of the corporation secure. That was the end which, since it is exactly what good faith and justice required, all the parties in interest, as well as the government, must be supposed to have sought to accomplish; and the enactment of the statute was well adapted and sufficient for the purpose. The plaintiff then, being a purchaser for value and the true owner of the bond in suit, had a right, under the implied authority conferred upon him by the defendants and subsequently ratified by law, to insert his own name in the bond as the payee or obligee thereof; and thereupon the instrument became in all its parts a perfect and complete contract, and he may well maintain an action upon it in his own name.

Judgment for the plaintiff.

Tenney & others, Administrators, v. Blanchard & another.

**SUSAN TENNEY & others, Administrators, vs. ALONZO V.
BLANCHARD & another.**

An indenture between the grantee of a right to redeem land from a mortgage, the mortgagee, who has entered for foreclosure, and a third person claiming title to the land, by which the mortgagee releases to the other parties his right of foreclosure, and agrees to collect the rents and divide them among all the parties in proportion to their claims against the original mortgagor, and in which provision is made for a future sale of the estate and a like division of the proceeds, implies a release of the equity of redemption.

SHAW, C. J. Bill in equity to redeem land in Palmer from a mortgage made by H. & C. Strong to the defendants. The facts in this case are not contested, and they are plain and simple. The Strongs, after the mortgage to the defendants, conveyed the premises to Eliphalet Tenney, the plaintiffs' intestate; of course this conveyance carried the right to redeem, being *prima facie* a title to the estate, subject only to the mortgage. But upon some ground or pretence, not fully explained, before the conveyance to Tenney, H. & C. Strong had made a deed of the premises to Hiram Converse, and another mortgage to the defendants.

The defendants entered to foreclose. In this state of things, and before any foreclosure or redemption, the defendants, with Tenney and Converse, entered into an agreement under seal, by which they recite their respective claims on the estate, under their respective titles, and the entry and actual possession of the premises by the defendants; the defendants' release to Tenney and Converse "all right or claim to the foreclosure of their mortgages, which they have acquired by possession of said premises under their mortgage, the said Tenney holding the equity of redemption of the same"; and the defendants covenant to rent the premises, and take the rents, and distribute them quarterly among all the parties, in proportion to the whole amount of their respective claims against the Strongs; and it is agreed that the premises shall not be sold within five years, without the consent of H. & C. Strong; but within that time, if they consent, or at the expiration of that time, without their

consent, the premises may be sold, and the proceeds distributed in the same proportions.

The court are of opinion that this was a good and valid agreement, binding on the parties, and necessarily implied a release on both sides — on the one side of the right to redeem, and on the other of the right to foreclose; because it provided for another disposition of the estate, with which such rights of redemption and of foreclosure would have been utterly incompatible. The defendants did, in terms, release their right to foreclose; and we think that Tenney, the plaintiffs' intestate, did as much by stipulations which necessarily implied such release. By such relinquishment, made by the plaintiffs' intestate, they are bound, and therefore have no right to a decree for redemption in this suit.

Bill dismissed.

F. A. Brooks, for the plaintiffs.

R. A. Chapman, for the defendants.

AUSTIN CHAPIN & others vs. FIRST UNIVERSALIST SOCIETY IN CHICOPEE.

An equitable estate will not sustain a writ of entry.

Separate conveyances by trustees, not for a charity or public trust, of their separate shares in the trust property, are void.

A conveyance to certain persons, trustees of a voluntary association, "in trust for the stockholders of said association" *habendum* "to the said stockholders, their heirs and assigns," gives the stockholders the equitable and not the legal estate.

WRIT OF ENTRY to recover possession of a portion of a building in Chicopee, "constructed as a church edifice with its appurtenances." Plea, nul disseisin. The parties submitted the following case to the decision of the court:

The building in question was erected in 1836, by the Cabotville Mechanics' Association, which was a voluntary association, formed for this purpose, having a written constitution and by-laws, and records of stock and of notes, and whose stock was issued to the subscribers, (most of whom were members of the

tenants' society,) in proportion to their subscriptions. The upper part of the building was fitted up as a church, and has since been occupied by the tenants, paying no rent, and applying the rents of pews for preaching. The rent of the shops in the lower part of the building has been received by the treasurer of the Mechanics' Association, and paid over to their stockholders.

On the 17th of January 1837, the building and land were conveyed by John Chase to John Chase and four others, "trustees of said association, in trust for the stockholders of the Cabotville Mechanics' Association, their heirs and assigns," *habendum* "to the said stockholders, their heirs and assigns."

The four demandants, either as original subscribers or by purchase, own all the shares in that association. One of them is John Chase, one of the original trustees; and Austin Chapin, another of the demandants, is the grantee by several conveyances of the title of each of them of the other four trustees.

J. Wells, for the demandants. The deed from John Chase to himself and others, trustees, "in trust for the stockholders of the Cabotville Mechanics' Association," vested the legal title in the "stockholders"—provided they were capable of taking the title. *Sammes's case*, 13 Co. 54. *Newhall v. Wheeler*, 7 Mass. 189. *Davis v. Hayden*, 9 Mass. 514. *Norton v. Leonard*, 12 Pick. 152. *Earle v. Wood*, 8 Cush. 430. *Pratt v. Sanger*, 4 Gray, 84. 1 Hilliard on Real Property, c. 22, §§ 11 & seq. "Stockholders" (with the aid of the subscription or contract of association) is a sufficient designation of the persons beneficially interested, to enable them to take the legal title. *Shaw v. Loud*, 12 Mass. 447. *Hall v. Leonard*, 1 Pick. 27. *Thomas v. Marshfield*, 10 Pick. 364.

If the title of the demandants is merely equitable, they may maintain ejectment upon it and their prior possession. *Newhall v. Wheeler*, 7 Mass. 189. *Goodwin v. Hubbard*, 15 Mass. 209. *Hadley v. Hopkins Academy*, 14 Pick. 240. *North Bridgewater Congregational Society v. Waring*, 24 Pick. 304. *Den v. Sinnickson*, 4 Halst. 149. *Smith v. Lorillard*, 10 Johns. 338. *Jackson v. Hubble*, 1 Cow. 613. Adams on Ejectment, (Amer. ed.) 45, 46 & notes. 1 Cruise Dig. tit. 12, c. 2, § 37.

The tenants being in by permission of the demandants, or their grantors, are estopped to deny their title. *Bailey v. Kilburn*, 10 Met. 176. *Cobb v. Arnold*, 8 Met. 398.

There was nothing in the character of the trust, or the duty of the trustees, which obliged them to retain the title in themselves. The demandants are entitled to recover the whole estate against strangers to their title, although the evidence does not show the transfer of all the shares of the original trustees to them. *Benedict v. Morse*, 10 Met. 223.

H. Vose, for the tenants. The demandants can recover only upon the strength of their own title, and not upon the weakness of the tenants'; and it must be a legal, and not a merely equitable title. 2 Greenl. Ev. § 331. 1 Cruise Dig. (Greenl. ed.) tit. 12, c. 2, § 36, & note. *Williams v. Ingell*, 21 Pick. 289. *Raymond v. Holden*, 2 Cush. 264. *Taft v. Stevens*, 3 Gray, 506.

By the deed of Chase of January 17th 1837, the legal estate in the premises conveyed vested in fee in the five grantees named as joint tenants, and the stockholders became interested as *cestuis que trust*. Rev. Sts. c. 59, §§ 10, 11. *Cleveland v. Hallett*, 6 Cush. 403. *Earle v. Wood*, 8 Cush. 447. *King v. Parker*, 9 Cush. 80. *Attorney General v. Federal Street Meeting House*, 3 Gray, 1. The *habendum* "to the said stockholders, their heirs and assigns," created no other estate in the stockholders, different from what they acquired under the grant to the trustees, in the premises of the deed. 4 Cruise Dig. tit. 32, c. 21, §§ 67-77. *Sumner v. Williams*, 8 Mass. 174.

As joint trustees, the original grantees under the deed of January 17th 1837 had an equal power, interest and authority in and over the trust estate; and, if they had any power to convey, all must join in any conveyance of their legal interest in the trust estate. They had no separate legal interest of their own on which their separate deeds would operate. Willis on Trustees, 136. 2 Story on Eq. § 1280. 1 Hilliard on Real Property, c. 25, §§ 37, 66. *Sinclair v. Jackson*, 8 Cow. 553, 584. *Wilbur v. Almy*, 12 How. 180. *Leffingwell v. Elliott*, 8 Pick. 455.

SHAW, C. J. The sole question in this case is that of legal title. The four demandants claim title to the premises on their

own seisin ; the tenants traverse by their plea of nul disseisin ; and thus the question of legal title is raised. But the demandants do not hold jointly ; two of them seem to have no other title than as stockholders in an association not incorporated, called the Cabotville Mechanics' Association, having themselves no other interest than that of *cestuis que trust*.

As a general rule, trustees, not for a charity or public trust, must join in holding or conveying trust property for the preservation of the trust, and separate conveyances by each of his aliquot part or separate share will be void. If the trust is apparent on the deed, all who take under it will take subject to such trust. That was the case here. These demandants do not show any legal estate. Two of them are *cestuis que trust*, or assignees or grantees of *cestuis que trust*, as shareholders in the stock of the voluntary unincorporated association known as the Cabotville Mechanics' Association. This is not a case in which it could be pretended that the use was within the statute of uses, so that the use was vested by force of the statute, and constituted an estate in fee.

If it is asked, what remedy the demandants have, who hold various shares in the joint stock of this unincorporated association ; the answer is, by bill in equity, if they have any beneficial interest in the estate, requiring the trustees to execute their trust by effecting a partition or sale, so as to secure to each the proceeds of his beneficial interest. It may be that the trusts in favor of the Universalist Society, or others, have priority to those of these shareholders, so that they have no valuable beneficial interest, and of course no remedy. But at all events they do not show that legal title necessary to maintain this action. *Cleveland v. Hallett*, 6 Cush. 407. *Demandants nonsuit.*

SHELDON WEBSTER vs. MILTON C. MUNGER.

A sale of intoxicating liquors in another state, by one citizen of this commonwealth to another, with knowledge or reasonable cause to believe that they were to be resold by the purchaser in this commonwealth against law, and with a view to such resale, will not support an action for the price in this commonwealth.

ACTION OF CONTRACT to recover the price of intoxicating liquors sold and delivered by the plaintiff to the defendant in 1853. The defendant answered that he was ignorant whether the liquors were sold or delivered as alleged; and that if they were, the sales were in contravention of *St.* 1852, c. 322, § 19. Trial in the court of common pleas in Hampden, at March term 1857, before *Morris, J.*, who signed a bill of exceptions, in substance as follows:

The plaintiff testified that in 1853 he was doing business at Hartford in the State of Connecticut, and that the sales of most of these liquors were made, and the goods forwarded from Hartford, upon written orders of the defendant, received by him through the mails at the post office in Hartford; and that the remaining items were ordered by the defendant in person, at the store of the plaintiff in Hartford.

Upon cross-examination of the plaintiff, evidence was elicited (the plaintiff objecting) "that the plaintiff, a resident of Springfield in this county, and dealer in liquors, did in the month of August 1852 give up his store in Springfield, and open another in Hartford, and that he visited Hartford almost daily, but continued to reside in Springfield; that once, during the period covered by the bill of particulars, the plaintiff visited Palmer, where the defendant was in business, but did not visit the defendant's store. And the plaintiff said he did not know but he might have seen the defendant at the Nassowanno House, in Palmer, and taken his orders there for the items" last mentioned.

"The defendant asked the plaintiff if he did not know, when he sold the liquors that the defendant bought them for the pur

poses of a resale in this commonwealth, contrary to law. This question was objected to by the plaintiff; but the court allowed it to be put. The plaintiff answered, I did not know that he bought to sell again in this commonwealth; I could not swear that he did; I thought likely that he did.

"In one of the orders for liquors, relied upon by the plaintiff, the defendant says: 'We want it for a man, Saturday evening; don't fail if you can help it. We do not pretend to do much liquor business, but sell a little.'

"Upon the evidence, the defendant contended, that if the contract was made in another state, the plaintiff could not recover in this action, if he knew, or had reasonable cause to believe, at the time of the sale, that the defendant bought the liquors, with intention of selling them again in this commonwealth, in violation of the statute which he pleaded in his defence.

"The court instructed the jury, 1st. That if the contract of sale was made in Hartford, where it was a legal transaction, the plaintiff could recover, unless for the reasons stated in the further instructions of the court, which were, 2dly. That if the sales were made in Hartford, in the State of Connecticut, by the plaintiff to the defendant, with a knowledge on the part of the plaintiff, that the liquors were to be resold in this commonwealth contrary to law, or if, when the plaintiff sold the liquors, he had reasonable cause to believe that they were to be resold by the defendant, contrary to the laws of this commonwealth, and the sales were made by plaintiff with a view to such a resale, then, or in either of these cases, the plaintiff cannot maintain this action. A verdict being found for the defendant, the plaintiff excepts to the foregoing rulings."

E. W. Bond, for the plaintiff. The evidence elicited from the plaintiff on cross-examination, and especially the question as to his knowledge at the time of the sale, should have been excluded.

If a sale is valid in the state where it is made, bare knowledge on the part of the vendor, that the vendee intends to put the goods to an illegal use in another state, will not prevent him from recovering the price, unless the vendor does some act in further-

ance of the unlawful object, or unless the illegal use to be made of the goods enters into the contract, and forms the motive or inducement to the sale in the mind of the vendor. *Dater v. Earl*, 3 Gray, 482. *Kreiss v. Seligman*, 8 Barb. 439. This court said in *Orcutt v. Nelson*, 1 Gray, 541, that "a sale of liquors in Connecticut, without any fraudulent view to their resale in Massachusetts contrary to law, was not unlawful, and an action may be maintained in this commonwealth for the price of liquors so sold." But the instructions given in the case at bar entirely omit the element of fraud.

J. G. Allen, for the defendant. By St. 1852, c. 322, § 19, "no action shall be maintained for the value of intoxicating liquors, except such as are sold or purchased in accordance with the provisions of this act." The question whether these sales were within "the provisions of this act" being a mixed question of law and fact, evidence of the plaintiff's residence, mode of conducting his business, and knowledge and means of knowledge touching the sales, were properly submitted to the jury, that they might determine whether the sale was made at Hartford honestly, or in fraud of the statute.

The final instructions of the court were correct. If the plaintiff had knowledge or reasonable cause to believe that the liquors were to be resold in this commonwealth in violation of law, and a view to such resale, he was *in pari delicto*, and cannot recover upon his own illegal contract. *Clugas v. Penahuna*, 4 T. R. 466. *Waymell v. Reed*, 5 T. R. 599. *Wheeler v. Russell*, 17 Mass. 258. *White v. Buss*, 3 Cush. 449. *Gregg v. Wyman*, 4 Cush. 322. *Duffy v. Gorman*, 10 Cush. 45. *Foster v. Marston*, 11 Cush. 523.

In *Orcutt v. Nelson*, 1 Gray, 536, the plaintiff was a resident in Connecticut, and could not be presumed, without evidence, to know the law of this state. The case of *Dater v. Earl*, 3 Gray, 482, was decided upon the law of New York, where the contract was made, and without reference to the previous decisions of this court.

The decision, after a consultation of all the judges, was made in Boston in June 1858.

Webster v. Muuger.

THOMAS, J. The case is not within the provision of the *St.* of 1852, c. 322, § 19. *Orcutt v. Nelson*, 1 Gray, 536.

The *St.* of 1855, c. 215, § 37, applies only to future sales. To give it effect in this case would be to make it retroactive, and by it to impair the obligation of an existing contract.

The validity of the plaintiff's sale must therefore be determined by the common law. And here the rule of sound sense, sound morals, and sound public policy is, that a sale made with the knowledge of the seller that the purchaser intends to use the thing sold in violation of law is illegal and void. Whether the law to be defeated is that of the country of the vendor cannot as matter of principle be material, especially when he is seeking his remedy in the tribunal of the country whose law he knew was to be violated. No comity requires the enforcement of such a contract. See, among other authorities, *Lightfoot v. Tenant*, 1 Bos. & Pul. 551; *Langton v. Hughes*, 1 M. & S. 593; 23 Amer. Jur. 13 & seq.; 2 Kent Com. (6th ed.) 489 note; Story's Conf. of Laws, § 253; *White v. Buss*, 3 Cush. 448; *Territt v. Bartlett*, 21 Verm. 184.

The confusion and conflict of authorities have resulted from the attempts to ingraft exceptions upon this salutary rule. The case of *Holman v. Johnson*, Cowp. 341, may be said to indicate the point of divergence.

But though we may deeply regret any departure from the rule, we must determine the question before us, not merely in the light of principle, but in that of the cases decided.

If the case of *M'Intyre v. Parks*, 3 Met. 207, is good law, it cannot be said that a sale made in another state, and valid by the law of that state, will be held void in this commonwealth from the bare fact of the knowledge or belief of the vendor of the purchaser's intent to resell in this state in violation of law. The rule of that case, if rightly decided, (in my judgment it was not,) is not to be extended, and the case at bar does not fall within it. The distinction is sound between a case where a seller simply has knowledge of the illegal design — no more — and where, having such knowledge, he makes a sale "with a view" to such design, and for the purpose of enabling the purchaser to effect it.

In the case before us the plaintiff was a citizen of and residing in this commonwealth. The evidence shows his knowledge of the illegal business in which the defendant was engaged. One of the orders was taken by the plaintiff at the domicile of the defendant in this state. In one of the written orders the illegal purpose for which the liquor was wanted, and the time when it would be wanted for that purpose, were indicated, and the plaintiff was urged not to fail in forwarding it for that end.

It was on this posture of the evidence that the jury were instructed: "1st. That if the contract of sale was made in Hartford, where it was a legal transaction, the plaintiff could recover, unless for the reasons stated in the further instructions of the court, which were,

"2dly. That if the sales were made in Hartford, in the State of Connecticut, by the plaintiff to the defendant, with a knowledge on the part of the plaintiff that the liquors were to be resold in this commonwealth, contrary to law, or if, when the plaintiff sold the liquors, he had reasonable cause to believe that they were to be resold by the defendant, contrary to the laws of this commonwealth, and the sales were made by plaintiff *with a view to such a resale*, then, or in either of these cases, the plaintiff cannot maintain this action."

Under these instructions, to have found a verdict for the defendant, the jury must have been satisfied, not merely that the plaintiff had knowledge of the illegal purpose of the defendant, but that he sold with reference to it and for the purpose of enabling him to effect it. In this view the instructions are thoroughly sound in principle, and do not conflict with the cases decided. *Orcutt v. Nelson*, 1 Gray, 541.

Exceptions overruled.

RUSSELL STONE vs. RODOLPHUS WHITE & others.

A declaration on a promissory note against one who had no share in the consideration for which it was given, and signed as surety some time after its execution and delivery by the maker, must aver the consideration of the defendant's signing.

A declaration, averring the existence of two considerations for a simple contract, is not sustained by proof of one; and the variance is not cured by verdict.

A declaration alleging two considerations for a contract may be amended in this court, after a verdict taken in the court of common pleas on proof of one only, and exceptions on that ground, by striking out the consideration not proved, the plaintiff taking no costs since the trial.

The signing by a third party as surety of a note payable on demand, some months after its execution by the original promisor and delivery to the payee, and for a new consideration, is a new and independent contract, not requiring the consent of the original promisor.

ACTION OF CONTRACT on two promissory notes payable on demand, signed by Rodolphus White and Philos Stratton, partners, as makers, and "Newell Snow, surety."

The plaintiff originally declared against all the defendants as makers of the notes, which were expressed to be "for value received," and copies of which were annexed. Snow answered that he signed them as surety only, long after they were made and delivered, and without consideration; and the other defendants relied on such signing by Snow as a material alteration.

The plaintiff then, by leave of court, filed four additional counts, the first and third of which alleged that White and Stratton made one of the notes, (a copy of which was annexed,) and that Snow "subsequently, for a valuable consideration, and with the assent and by the request of the said White and Stratton, signed the same, thereby promising and becoming liable to pay the amount thereof according to the terms thereof;" and the second and fourth of which, after alleging the making of the notes by White and Stratton, averred that, "a long time after, to wit, six months after said note was due, Snow, for a valuable consideration, to wit, in consideration that the plaintiff would and did agree to give time on said note to said White and Stratton, the original promisors, and not at once take steps to collect the same, and also in consideration that said White and

Stratton would and did put funds and securities into the hands of said Snow, to indemnify him for signing said note, and for other valuable considerations, signed said note; and said White and Stratton consented thereto, and requested said Snow so to do; and the plaintiff fulfilled his said agreement, and did give time on said note, and did not at once take steps to collect the same, but forbore to sue said note, or take any steps for the recovery thereof for a long space of time, to wit, for one year; and the said Snow by his said signing became liable and promised to pay to the plaintiff the amount of said note, according to the terms thereof."

White and Stratton made no defence; but Snow answered, denying that there was any consideration for the notes; that he signed them at the request of White and Stratton; that the plaintiff agreed to give time to White and Stratton; or that they ever put any funds or securities into his hands for his indemnity.

At the trial in the court of common pleas in Franklin, before *Briggs, J.*, it was proved that White and Stratton were the original makers of the notes in suit, and that Snow signed the notes as surety some months after their execution by the makers and delivery to the plaintiff. The only consideration for the signing of the notes by Snow, of which any evidence was offered, or on which the plaintiff claimed to recover, was of the plaintiff's agreement to give time to White and Stratton, as alleged in the second and fourth additional counts.

The defendant requested the court to instruct the jury, that the plaintiff was bound to prove the whole consideration, as alleged in the second and fourth additional counts; that he must prove that Snow signed the notes with the consent and at the request of White and Stratton; that Snow's signing the notes as surety long after they were made, if done without the knowledge, request and assent of White and Stratton at the time, was such a material alteration of the notes as rendered them void, even as against Snow; that the mere fact that the plaintiff did give White and Stratton time on the notes had no tendency to prove the agreement to give time.

But the court refused; and instructed the jury, that the plaintiff, to entitle him to recover, must prove the allegation of an agreement to give time to White and Stratton, and his actual forbearance; that Snow must have signed with the consent of White and Stratton, or one of them; and that the consent of one, after the dissolution of their partnership, would be sufficient; "and, for the purpose of the trial, the court instructed the jury, that although more than one consideration was alleged for Snow's signing, it would be sufficient for the plaintiff to prove but one of the considerations alleged." The jury returned a verdict for the plaintiff, and Snow alleged exceptions.

This case was argued at the last term.

W. Griswold & S. T. Field, for the defendant. 1. The undertaking of Snow was collateral and of the nature of a guaranty, and must be declared on as such. *Mecorney v. Stanley*, 8 Cush. 85. *Union Bank v. Willis*, 8 Met. 504. *Benthall v. Judkins*, 13 Met. 265. 3 Kent Com. (6th ed.) 121. Story on Notes, §§ 467, 468. *Tenney v. Prince*, 4 Pick. 385. Forms annexed to *St.* 1852, c. 312.

2. In declaring on such a contract the consideration must be alleged in the declaration. *Northrup v. Jackson*, 13 Wend. 85. 1 U. S. Dig. Assumpsit, 710, 725, 1000. 1 Chit. Pl. (6th Amer. ed.) 321. *Hemmenway v. Hickes*, 4 Pick. 497.

3. The consideration must be proved as alleged, or the variance will be fatal. *Bristow v. Wright*, 2 Doug. 666, and 1 Smith's Lead. Cas. 324. *Curley v. Dean*, 4 Conn. 256. 1 Greenl. Ev. §§ 66, 68. 1 Chit. Pl. 327. *Weall v. King*, 12 East, 452. *Stone v. Knowlton*, 3 Wend. 374. 3 Stark Ev. (1st Amer. ed.) 1548. *Brackett v. Evans*, 1 Cush. 79. *Buddington v. Shearer*, 20 Pick. 477. The second and fourth additional counts each alleged two considerations, and only one was proved. The exceptions taken to the rulings of the court below must therefore be sustained.

4. The signature of Snow, made without the knowledge and assent of White and Stratton, was such a material alteration of the note as to render it void. *Gardner v. Walsh*, 5 El. & Bl. 83. White alone had not authority to assent to such an alteration of the contract so as to bind the firm. Story on Part. §§ 113, 322.

C. Allen, for the plaintiff. 1. The action may be maintained on the original counts, with proof of a new consideration. *Sargent v. Robbins*, 19 N. H. 572.

2. The action may be maintained on the first and third amended counts; and no specific averment of consideration is necessary, by *St. 1852, c. 312, § 2, cl. 3, 9*. At common law the action being on a note, and the defendant styling himself "surety," no specific averment of consideration would be necessary, there being a consideration apparent upon the face of it. If any averment of consideration is necessary, "for a valuable consideration" is sufficient, especially when taken in connection with the copies of the notes, which are expressed to be "for value received." *Jerome v. Whitney*, 7 Johns. 321.

If a consideration is not sufficiently stated in these counts to support an action, there should have been a demurrer; and no objection having been taken at the trial, when an amendment might have been allowed, it is now too late to object to them. *Bickford v. Gibbs*, 8 Cush. 154. *Burnett v. Smith*, 4 Gray, 50. *Lawes on Assumpsit*, 59.

After verdict, a defective statement of consideration will be aided, and a proper and full consideration will be presumed to have been proved. *Hendrick v. Seeley*, 6 Conn. 176. *Ward v. Harris*, 2 Bos. & Pul. 265. *Crowther v. Oldfield*, 2 Ld. Raym. 1225. *Jackson v. Alexander*, 3 Johns. 484.

3. The second and fourth amended counts are sufficiently supported by the evidence, and not contradicted. (1.) The recital "for value received" was evidence of consideration sufficient to put the defendant on his defence. *Jennison v. Stafford*, 1 Cush. 168. *Burnham v. Allen*, 1 Gray, 496. *Jerome v. Whitney*, 7 Johns. 321. (2.) A sufficient actual consideration was proved by competent evidence, submitted to the jury under proper instructions. *Mecorney v. Stanley*, 8 Cush. 85. *Walker v. Sherman*, 11 Met. 170. *Breed v. Hillhouse*, 7 Conn. 523.

If there is a variance, the declaration may be amended at any time before final judgment; and this is a proper case for such amendment. *St. 1852, c. 312, §§ 32-35*. *Cleaves v. Lord*, 3 Gray, 66.

Stone v. White & others.

4. A note is not vitiated by the addition of a surety, either as to such surety, or as to the principal debtor, whether such addition is by consent or not. *Peake v. Dorwin*, 25 Verm. 28. *Hughes v. Littlefield*, 18 Maine, 400. *Powers v. Nash*, 37 Maine, 322. *Howe v. Peabody*, 2 Gray, 556. *Bryant v. Eastman*, 7 Cush. 111. *Tenney v. Prince*, 4 Pick. 385. *Speake v. United States*, 9 Cranch, 28. *Calton v. Simpson*, 8 Ad. & El. 136. But if the consent of the principal signers was necessary, it was sufficiently shown.

BIGLOW, J. It is very clear that the plaintiff could not recover against the defendant Snow, upon the counts in this writ, charging him as an original party to the note set out in the declaration. Upon the evidence, it appeared that he was not a party to the note when it was made, and did not partake in the consideration for which it was given. He affixed his name to it several months after its date, and while it was in the hands of the payee. His contract was collateral to that of the signers of the note, and was in its nature a guaranty of their promise. It was essential therefore, in order to charge the defendant upon this contract, to prove a new and independent consideration in addition to that on which the note was founded. Not being a surety acting upon the same consideration with the original promisors, he could be held liable only by proof of some damage or loss to the plaintiff, or some benefit or advantage to the defendant, as constituting a legal consideration for his contract. *Tenney v. Prince*, 4 Pick. 385. *Mecorney v. Stanley*, 8 Cush. 85.

It was not sufficient, therefore, to declare against the defendant as upon a promissory note, where, according to the rules of pleading, the mere statement of the liability which constitutes the consideration is sufficient; but it was necessary, as in all cases of simple contracts, that the declaration should disclose a consideration, either of benefit to the defendant, or of detriment to the plaintiff; as otherwise it would appear on the face of the declaration to be *nudum pactum*. 1 Chit. Pl. (6th Amer. ed.) 321. 1 Saund. 211, note 2. *Jones v. Ashburnham*, 4 East, 455.

This well established rule of pleading is not changed by *S.* 1852, c. 312. On the contrary, § 2 of that statute requires, by

necessary implication, that all matters to be proved, and all substantive facts, essential to constitute the cause of action, shall be averred in the declaration. And in the schedule of forms, appended to the statute, it is expressly recognized. In the forms of declarations on promissory notes against promisors and indorsers, a mere statement of the liability is required ; while in the forms of declarations on contracts of guaranty or suretyship, the consideration is fully set forth.

It is manifest upon the bill of exceptions that the plaintiff at the trial relied only upon his second and fourth amended counts, in which he sought to charge the defendant on his collateral undertaking as guarantor of the notes described in the declaration. These counts were clearly sufficient; and if the plaintiff had proved his case as laid, he would have shown a good ground of action. There was no defect in either count, which would have been good ground of demurrer. The objection is not, that the consideration of the contract is not sufficiently averred ; but it is that the averment of the entire consideration was not supported by the proof, and that there was therefore a fatal variance in the statement of the contract.

It is a familiar rule of pleading in assumpsit, that the consideration, which forms the basis of the contract, must be set forth with great accuracy, as otherwise the whole contract will be misdescribed. This rule, as already stated, does not apply to promissory notes or bills of exchange, which of themselves imply a consideration ; but it includes all other simple contracts and promises, where the plaintiff, in order to sustain his action, is bound to prove a consideration. It is not sufficient to prove part of an entire consideration ; nor is it a compliance with the rule, to omit proof of a portion of a consideration consisting of several things. The evidence must show neither more nor less of the consideration than is alleged. It must be proved to the extent alleged, otherwise the variance will be fatal. If the proof exceeds the statement of the consideration, or falls short of it, it is equally a misdescription, and does not support the declaration. Thus it has been held, that if two good considerations are alleged, and one of them is not proved, or is found false by the jury, the

plaintiff must fail. The only exception to this rule, as applied to contracts which do not of themselves import a consideration, is where several considerations are averred, in part good, and in part frivolous and insufficient. In such case, the insufficient portion is treated as surplusage, and the declaration is supported by proof of that part of the consideration averred in the declaration, which is good and sufficient to support the promise. Lawes on Assumpsit, 56. 1 Chit. Pl. 321-327. *Coulston v. Carr*, Cro. Eliz. 848. *Rawson v. Brown*, 4 Leon. 3. *Lansing v. M^r Killip*, 3 Caines, 286.

The application of this rule to the case at bar fully sustains the ground taken by the defendant at the trial. The second and fourth amended counts both aver two good and distinct considerations, either of which were sufficient to support a promise. In each it is alleged that the consideration of the defendant's promise was forbearance by the plaintiff to sue the original parties to the note in compliance with an agreement to that effect, and also that the plaintiff deposited in the hands of the defendant funds and securities to indemnify him for his promise. The evidence tended to prove the former of these allegations; but there was no proof in support of the latter. Under these circumstances it was the duty of the judge to instruct the jury, according to the request of the defendant, that the plaintiff was bound to prove the whole considerations as alleged; and his refusal to do so is good ground of exception. Being a defect in the proof, and not in the declaration, it is not, as urged by the plaintiff, aided or cured by the verdict.

But although the objection was well taken by the defendant, it is of a strictly technical character, and in no way affects the merits of the case; nor was the defendant at all prejudiced or injured by it in the trial of the case. A good consideration for the defendant's promise was averred, and the verdict of the jury has found that it was proved to their satisfaction. An amendment striking out this part of the consideration, of which there was no proof, will cure the defect, and entitle the plaintiff to hold his verdict. Such an amendment the court are authorized to allow under Rev. Sts. c. 100, § 22, and St. 1852, c. 312, § 32;

and if moved for, it will be allowed, the plaintiff taking no costs incurred since the trial, according to the decision in *Cleaves v. Lord*, 3 Gray, 71.

The remaining objections insisted on by the defendant are untenable. The placing of the name of Snow on the note under the circumstances proved did not constitute an alteration of the contract of the original parties. It did not in any way change or affect their rights. It was a new and independent contract, made on a sufficient consideration with a third party, to which their assent was unnecessary. The validity of such contracts have been often recognized in this commonwealth. *Tenney v. Prince*, 4 Pick. 385. *Bryant v. Eastman*, 7 Cush. 111. See also *Cotton v. Simpson*, 8 Ad. & El. 136, and 3 Nev. & P. 248; *Hughes v. Littlefield*, 18 Maine, 400; *Powers v. Nash*, 37 Maine, 322.

TROY AND GREENFIELD RAILROAD COMPANY vs. HERVEY C. NEWTON.

At the trial of a case in the court of common pleas, the defendant objected to the plaintiff's right to recover upon the facts proved, and a nonsuit was entered; the parties agreeing, as was stated in the bill of exceptions, "that the various legal questions arising in the case should be submitted to the supreme court as upon a statement of facts." *Held*, that upon the hearing of the case in this court, no objection could be taken to the sufficiency of the answer.

Under an act of incorporation providing that the number of shares shall not exceed a certain limit, and shall be determined from time to time by the directors, no assessment can be laid until the number of shares is so determined.

A subscription paper for shares in a railroad corporation, which provides that assessments may be laid "when three thousand shares shall have been subscribed," does not authorize the laying of an assessment until the stipulated amount has been unconditionally subscribed, payable in cash.

Thus this provision does not include a subscription, by a contractor for building a railroad, of a certain number of shares, "being a portion of" a sum which, by his contract, was to be paid to him in stock at par, or, in case of any stock being issued by the corporation below par, then at the rate of the lowest issue.

So of a subscription to the stock of a railroad company, (who are authorized by their charter to connect at the State line with any railroad that may be constructed from a place in another state, or to take a lease of any such contiguous railroad,) upon condition that no assessment shall be made until that part of the railroad between the end of the line in another state and a certain place in this commonwealth shall be put under contract.

Troy and Greenfield Railroad Company v. Newton.

DEWEY, J. This action is brought upon the Rev. Sts. c. 39, § 53, to recover the balance remaining due and unpaid upon two shares of stock in the plaintiff company, the said shares having been sold at auction for nonpayment of assessments thereon. The case stated in the declaration assumes that the defendant had become a legal holder of two shares of the stock of the company, and as such was under the statute liable for the deficiency that had arisen. The question as to the nature of the action has heretofore been considered by the court. *Troy & Greenfield Railroad v. Newton*, 1 Gray, 544.

Various objections have been taken and urged against the maintenance of the present action. Of these a very prominent one is the objection that the directors of the company had not, previously to making the assessment, fixed the number of shares of which the capital stock of the company should consist. It was said on the part of the plaintiffs that this point was not open to the defendant, because not distinctly taken in his answer. But he does in his answer specifically deny "that the plaintiffs legally exercised their corporate powers, and in such manner as to bind the defendant"; and he denies "that he is liable for the amount declared for." See *People's Mutual Fire Ins. Co. v. Arthur*, 7 Gray, 267.

But if it be doubtful whether this precise defence is specifically stated in the answer, we still think this ground of defence is properly open before us. The case came to trial before the court of common pleas upon the auditor's report, and other facts agreed by the parties, including a reference to documentary evidence; and upon objection taken to the plaintiffs' right of recovery upon the case thus presented, if any objection was to be taken to the insufficiency of the answer to open the defence, that was the time and place to have done so. *Jones v. Sisson*, 6 Gray, 294. But instead of this, the case was there disposed of by a nonsuit; "the parties agreeing," as is stated in the bill of exceptions, "that the various legal questions arising in the case should be submitted to the supreme court as upon a statement of facts, and that thereupon the supreme court should make such disposition of the case and enter such judgment, order or ruling as justice should require."

We are then to examine and determine the question whether the omission on the part of the directors to fix and determine the amount of the capital, or number of shares, prior to the making of these assessments, is fatal to the validity of the assessment. The only provisions of the charter of the company in respect to this are that "the capital stock of the said company shall consist of not more than thirty five thousand shares, the number of which shall from time to time be determined by the directors thereof; and no assessment shall be laid of a greater amount thereon in the whole than one hundred dollars on each share." *St. 1848, c. 307, § 4.*

The present case does not in strictness fall within the cases where the amount of capital stock was fixed by the charter, as in *Salem Milldam v. Ropes*, 6 Pick. 23, and *Stoneham Branch Railroad v. Gould*, 2 Gray, 277; or those where the capital was fixed by the terms of the subscription books, as in *Cabot & West Springfield Bridge v. Chapin*, 6 Cush. 50, and *Atlantic Cotton Mills v. Abbott*, 9 Cush. 423.

It is a case of a charter, making provisions as to the capital stock or number of shares, fixing the maximum of the capital stock to which the company may be entitled, but beyond that leaving the precise number of shares from time to time to be determined by the directors of the company. In the provisions in the charter as to the maximum of the stock, and as to the determination of the number of shares from time to time by the directors, the present case resembles the cases of *Lexington & West Cambridge Railroad v. Chandler*, 13 Met. 311, and *Worcester & Nashua Railroad v. Hinds*, 8 Cush. 110. It differs from them both, as they do also from each other, in other circumstances.

From these cases however the principle may be derived, as applicable to charters of this character, that it is the duty of the directors in such case to fix and determine the number of shares from time to time. This number may be enlarged; but for the time being there must be a fixed number. This is strictly so held in respect to assessments upon shareholders, who are such by force of ordinary subscriptions to the stock.

In the case of *Worcester & Nashua Railroad v. Hinds*, 8 Cush. 110, such assessment, having been made before the directors had fixed the number of shares that were to compose the present capital stock, was held to be illegal, and an assessment that could not be enforced. That case is very direct, and would be decisive of the present case, independently of the form of the subscription paper signed by the defendant. Certain provisions or conditions are contained in the subscription, in the present case, as to the number of shares necessary to be taken and subscribed for before making assessments for constructing the road.

The case of *Lexington & West Cambridge Railroad v. Chandler*, 13 Met. 311, was a case of a charter like the present in the fixing of the number of shares by the directors; but it had the further provision, that the corporation should commence the construction of the road whenever two hundred and fifty shares should have been subscribed; and that number had been unquestionably subscribed. It was also found as a fact in that case that, prior to making the assessment, the directors had voted to close the subscription books of the capital stock. Upon these facts the assessment was held legal, the court dealing with it as a case where the charter had fixed the necessary number of shares required to authorize going forward with the construction of the road, and also finding, in the vote of the directors to close the subscription books, that they did thereby virtually fix and determine the present capital stock.

But the present case has neither of those elements, nothing in its charter indicating an authority in the corporation to proceed to the construction of the road upon a certain number of shares being subscribed; nor is there any direct vote of the directors, closing the subscription books. On the contrary, at the meeting on the 27th of December 1850, at which the directors, through the committee, made a computation of the number of shares subscribed, a committee was appointed to solicit further subscriptions to the stock; and, at the meeting held by adjournment on the 7th of January 1851, the directors were pursuing a similar course. The auditor reports that on the 5th of February 1851, when the first of the assessments sought to

be recovered was laid, the whole number of shares, in the various forms they had been taken, conditional and unconditional, was three thousand five hundred and fifty five, which much exceeds the number reported by the committee of the directors on the 27th of December 1850. It is apparent from the subscription books, that many shares were subscribed for between the 27th of December 1850 and the 5th of February 1851. The result is therefore that the report of the number of shares, as subscribed for in December 1850, was not a closing of the subscription books, or fixing for the time being the number of shares of the company, and making that the basis of the subsequent assessment.

Taking the most favorable view of the present case, it lacks the two facts that existed in the case of *Lexington & West Cambridge Railroad v. Chandler*, 13 Met. 311, namely, the provision in the charter authorizing the corporation to proceed with the construction of the road when two hundred and fifty shares should have been subscribed; and a vote of the directors of the company, closing the subscription books.

So far then as this action is founded upon the provisions of the Rev. Sts. c. 39, § 53, and treating these shares as ordinary subscriptions for stock under this charter, and with no provision in the subscription paper that fixed the capital stock, or determined the number of shares necessary to be subscribed, it would seem quite clear that these assessments must be held invalid, for the reason that the directors had not pursuant to the charter fixed and determined the number of shares of which the capital stock should consist for the time being.

We have not overlooked the case of *Chester Glass Co. v. Dewey*, 16 Mass. 100. That case was more relied upon in reference to the question as to the organization of the company—a point not the ground of the decision of the present case. It may be thought, however, to have some bearing upon the question of the effect of the omission of the directors to fix the amount of the capital stock. That was an action directly upon the subscription paper. The plaintiffs were a manufacturing corporation created under the St. of 1808, c. 65, which

provided nothing more than "that the property of such corporations shall be divided into shares and numbered in progressive order." It appeared that the directors had made twenty nine shares, and there was no objection that they had not been numbered in progressive order. The principal question seems to have been, whether it was absolutely necessary for the defendant to have received his certificate, to constitute him a member and subject him to liabilities as such, where, through his own fault, he had not received it. The Rev. Sts. c. 38, § 9, are materially different as to manufacturing corporations from the St. of 1808, c. 65, requiring that the amount of the capital stock shall be fixed and limited by the company at its first meeting; and a more rigid rule would now be held as to thus determining the number of shares than was adopted in *Chester Glass Co. v. Dewey*.

It is said however, on the part of the plaintiffs, that, in the present case, it was not necessary for the directors to determine the number of the shares or fix the amount of the capital stock for the time being, before proceeding to make assessments, because the subscribers to the stock, by the terms of their subscription, agreed that when three thousand shares should have been subscribed, assessments might be made. We have not thought it necessary to enter upon the question whether, under the present declaration, the plaintiffs could rely upon that ground for an answer to the objection of the omission of the directors to fix the amount of the capital stock; but treat this question, as we have the defence to the action, upon the question of legal right upon facts stated by the parties. Assuming that the plaintiffs might have all the benefits they could have under an action brought directly upon the subscription paper, it then becomes material to ascertain whether in fact three thousand shares were subscribed for before either of the contested assessments was made.

The subscription paper signed by the defendant has the following provision: "When three thousand shares shall have been subscribed, the directors may levy assessments upon the same, provided that not more than ten dollars per share shall be

assessed upon each share at any one time, nor more than twenty five per centum of the amount subscribed, within any three months; and no subscriber shall be liable beyond the amount of his subscription, but to such extent the company shall have the power to enforce its claims against a delinquent subscriber by sale of his stock, and by process against him or his representatives." This was a form of subscription adopted by the corporators named in the act of incorporation. Their vote was "to adopt the following form of subscription," being that above recited, with other provisions not material to the point under consideration. This was the form of subscription under which the defendant subscribed for two shares, upon which assessments have been laid, for payment of which this action is brought.

Treating the stipulation in the subscription paper, above quoted, as the foundation of the action, and giving to it all the effect that the plaintiffs would claim as fixing the number of shares that must exist to authorize assessments, yet it leaves open the defence that three thousand shares were not subscribed; and that fact must be shown to exist before the defendant can be charged with these assessments.

What is the just and true import of the words "when three thousand shares shall be subscribed"? The form of the subscription paper which the defendant signed was that prescribed by the corporators. The condition must properly be taken to have reference to the same or substantially similar subscription papers. If any conditions or limitations were annexed to other subscriptions, they were not the subscriptions of shares to which we must suppose the defendant referred when he stipulated to pay an assessment made after three thousand shares should have been subscribed.

This subject was somewhat considered in the case of *Cabot & West Springfield Bridge v Chapin*, 6 Cush. 50, where it was stated in the subscription paper, "the capital stock to be in four hundred shares of one hundred dollars each," and the defendant, in defence of an action to recover the payment of his subscription, relied upon the fact, that of the four hundred shares alleged

to have been subscribed two hundred shares were, by the terms of the subscription, to be paid for in the stock of the Connecticut River Railroad Company, share for share, which latter shares were at a discount of seven per cent. below the par value. The court in that case held, that the four hundred shares required by the terms of the subscription to be taken were to be subscribed for, payable in cash or its equivalent, calculating the shares at \$100 each, and that the defendants, having subscribed for three shares at that rate, had a right to expect that their associates should take their shares on similar terms with themselves, if they were to be held to the payment of their subscription. If they were shares subscribed for upon other terms, it was held "that they were not bound to treat such subscriptions as legal subscriptions, in making up the required number of four hundred shares."

With these principles for our guide, we are to inquire whether three thousand shares of the stock of the plaintiff corporation were duly subscribed for prior to the levying of assessments on the 5th of February 1851. This fact must be shown; and if not established, then there was no authority for making the assessments and enforcing their collection under the subscription paper, or by aid of its provisions as to the number of shares required to authorize assessments to be made.

The auditor has found that the whole number of shares subscribed before the 5th of February 1851, both absolute and conditional, was three thousand five hundred and fifty five. This reduces the question practically to this: Are there more than five hundred and fifty five of those subscriptions so affected by conditions and qualifications that they cannot be embraced in the class of subscriptions referred to in the subscription paper signed by the defendant? The auditor has with great clearness divided these conditional or qualified subscriptions into their appropriate classes. They differ very materially in the nature of their conditions. We suppose no one would doubt that the five shares subscribed for in Book No. 3, with this condition annexed, 'on condition that the road shall be tunnelled through the Green Mountains,' was an absolute subscription on the 5th

of February 1851. There are others of small amount, equally obvious in their character.

But we have thought it more useful to consider the objections taken to some of the larger subscriptions, which, if well taken, will reduce the number of absolute shares below three thousand.

Among these subscriptions there are five hundred shares subscribed by Gilmore & Carpenter, under date of January 23 1851, with the following qualifying clause: "being a portion of the twenty five per cent. named in our contract for graduation." It appears from the report of the auditor that Gilmore & Carpenter, on the 4th of October 1850, made a contract with the plaintiffs for the graduation, masonry, &c. of certain portions of the proposed road, being Divisions Nos. 1 and 5; and that the Division No. 1 was required to be completed on or before the 1st of September 1852, and Division No. 5 on or before the 1st of July 1851. The contractors were to be paid monthly, on the engineer's estimate of the amount of work actually done, fifty per cent. of the contract price in cash, and twenty five per cent. in stock or bonds of the company, at the election of the contractors; and, upon the completion of the work, the remaining twenty five per cent. in stock of the company.

This subscription was, it is obvious, not a cash subscription, and not a promise to pay any cash assessment on the same. The receipt of the stock by them depended entirely upon a contingency, as the contractors might fail to do the work and so no stock be earned. It was liable to be abandoned in whole or in part, and, as we understand from the auditor's report, the contract was not performed. It was by the terms of the contract stipulated that it might be put an end to "if Gilmore & Carpenter shall not on their part well and truly perform all the covenants herein contained." And it appears that the directors of the company, on the 4th of December 1851, voted "that the committee on construction be authorized to enter into any contract with Gilmore & Carpenter, that they may deem for the interest of the company, with reference to suspending the work on any portions of the road on the west side of the mountain," thus treating the contract as one that might be rescinded.

But another objection to this subscription as an absolute one, and having corresponding obligations to that of the defendant, is found in that portion of the contract made by said Gilmore & Carpenter, wherein it was provided, that the stock they were to receive in discharge of the contract was to be taken at the par value of \$100 a share, "provided the corporation do not issue any stock for less than \$100 a share, and in case any stock is issued at less rates, then the said Gilmore & Carpenter are to receive the balance due on the twenty five per cent. at the rates of the lowest issue." If their subscription was nothing more than taking the same as a portion of the twenty five per cent. named in their contract, it may be supposed to have reference to this qualification as to the stock to be taken by them. So far from being absolute subscribers of five hundred shares, they were subscribers with certain qualifications which rendered it entirely contingent whether they would assume the relation of stockholders in the company. They were by their contract to receive stock upon the performance of a certain contract. They did not agree in common with the defendant to pay all assessments that might be laid from time to time upon the shares of the stock. Now, however expedient it may have been to take this qualified subscription of Gilmore & Carpenter with a view to further the progress of the work, it cannot be treated as a subscription of the class embraced in the terms of the original subscription papers, by which the defendant and others agreed to be assessed whenever three thousand shares should have been subscribed.

The next class which we have particularly considered is that of the one hundred and thirty shares subscribed on the condition that "no assessment shall be made until the work is commenced, and that part of the road from Adams to Troy is put under contract." This condition, taken literally, makes this subscription for one hundred and thirty shares a subscription with conditions entirely differing from that of the defendant, being conditions precedent that have not been performed, and by reason of which it would be excluded from computation as a part of the thirty thousand shares required to be sub-

scribed before making assessments for the construction of the work.

The only answer to this is, that the parties could not have contemplated as a condition the putting under a contract work to be done beyond the line of Massachusetts, that being the extent of the plaintiffs' road. This suggestion is certainly entitled to consideration, but it is to be weighed with all the other attendant circumstances. The language of this condition, as found on the face of the subscription in Book No. 27, is, that "the road from Adams to Troy is put under contract." We find that upon Book No. 24 two hundred and twenty three shares were subscribed, upon the condition "that no assessment shall be made until that part of the road from Adams to Pownal line is under contract." It will be observed, as to this latter form of subscription, that where the purpose was to limit the condition to a contract for a road exclusively in the State of Massachusetts, the proper words were used to express that intention. The charter of the plaintiffs clearly indicates the purpose of a continuous line of railroad to Troy. The name of the corporation is "The Troy and Greenfield Railroad Company." Its location by the terms of the charter was to be "to some point on the line of the State of New York or of Vermont, convenient to meet or connect with any railroad that may be constructed from any point at or near the city of Troy." *St.* 1848, *c.* 307, § 2. Section 8 authorizes the corporation to "contract with the owners of any contiguous railroad leading into or from either of the States of Vermont or New York, for the use of the whole or any part thereof, or for operating the two roads conjointly, or for the leasing of such contiguous road, or for the letting of their own road to the owners of such contiguous road, or any other road which composes a part of the railroad line between Boston and Troy, of which the railroad hereby authorized shall be a part."

We perceive therefore reasons existing for treating this road as connected with a railroad terminating at Troy, and which may have induced the subscribers of these one hundred and thirty shares to have made it a condition of their subscrip-

tion and liability to assessment, that the road was put under contract from Adams to Troy. The subscribers for these shares having made it in terms a condition precedent that no assessment upon them shall be made until that event should happen, we do not feel at liberty to say that these shares can be computed as a part of the three thousand shares required to be subscribed.

The one hundred shares subscribed by James E. Marshall on the 10th of December 1850, are alleged by the defendant to have been subscribed in execution of his bond, and under the terms and stipulations of that bond, which were: "I do hereby subscribe for one hundred shares to the capital stock of said railroad company ten thousand dollars, provided the said railroad company will receive for payment of the same the following notes, payable to James E. Marshall or bearer, in charcoal, to be delivered on the bank of the North Adams Iron Company's furnace in Adams, at six dollars per hundred bushels." Then followed copies of five notes, for \$2000 each, dated Adams, May 30th 1850, signed by Mason B. Green and Allen B. Darling, and payable "in good merchantable charcoal," as above, in one, two, three, four and five years respectively.

Assuming that the subscription and the bond are parts of the same transaction, the subscription of Marshall for the one hundred shares was clearly a qualified one, and not to be considered as an ordinary subscription. It stipulated for a delay in time of payment. The first note did not become due until after forty per centum had been assessed on the shares of the defendant, and the second note not until all the assessments were made, and the remaining three not for years after. The condition of this subscription was therefore not only to pay in merchandise, but to pay at a day future, and more remote than was required by the assessment on the defendant's shares. It was also to take an article of merchandise, not at its market value, but at a stipulated price, which might materially affect the amount to be realized therefrom, as it would be subject to all the fluctuations of price in the article during the period of five years. If this condition or form of payment is fixed upon the original sub-

scription, it would seem obvious that these one hundred shares cannot be computed as a part of the three thousand shares required to be subscribed. This written contract, of one date with the subscription, comes from the hands of the officers of the corporation. It was formally accepted by them by a regular vote of the directors on the 8th of July 1851, and the certificates of shares were then delivered to Marshall. Under all the facts, the inference would seem to be that the plaintiffs accepted this subscription in connection with the bond, and as a part of the same transaction, and thereby excluded it from the class of absolute subscriptions. If the decision of the present case turned upon this subscription, and there was any serious question intended to be made as to the connection between this subscription and the bond above described, we might have been disposed to hear the parties further upon that point. But as the subscription of Gilmore & Carpenter of the 21st of January 1851, and the subscriptions for shares accompanied by the condition that no assessments should be laid before the road should be put under contract to Troy, amount to six hundred and thirty shares, which number, deducted from the whole number of shares subscribed, three thousand five hundred and fifty five, leaves but two thousand nine hundred and twenty five shares, it is quite unnecessary to pursue this subject further.

The result is therefore, if we give full effect to the terms of the subscription by the defendant, as fixing for the time the number of shares, yet no liability has attached thereon, because the condition precedent of three thousand shares being subscribed has not been established by the proof. In any aspect of the case the plaintiffs must fail in maintaining their action.

Judgment for the defendant.

R. A. Chapman & D. W. Alvord, for the plaintiffs.

C. P. Huntington & W. Griswold, for the defendant.

JUSTUS STARKS vs. BENJAMIN SIKES.

Two out of three tenants in common executed a lease for years of the whole estate, by which the lessee covenanted to insure for the benefit of the lessors. A policy was obtained accordingly, and assigned to one of the two cotenants, who recovered the whole amount of a loss from the insurance company. *Held*, that he was liable to an action by the third cotenant for his proportion of the amount; and that the admission of a conversation between the defendant and a third person before the assignment of the policy, for the purpose of showing that the assignment was to be for the benefit of all the owners of the property, was no ground for a new trial.

A witness testified on cross-examination that he had never expressed any hostile feelings towards the defendant. The defendant, for the purpose of contradicting him, offered evidence that the witness, in conversation with a third person about a note which had just been signed by the witness and then by the defendant, said that the defendant had never paid him for certain services, and that he was worth nothing himself and had taken this course to get money out of the defendant. *Held*, that the exclusion of this evidence was no ground of exception.

ACTION OF CONTRACT to recover one fourth of money received by the defendant under a policy of insurance on a mill and machinery in Whately, of which the plaintiff, the defendant and Danforth Works were tenants in common, the plaintiff's share being one fourth.

At the trial in this court at September term 1857, in Franklin, before *Metcalf, J.*, it appeared that the premises were leased by the defendant and Works to Harding and Buffum, who stipulated on their part to insure the premises for the lessors in the sum of \$4000, and did insure accordingly; that the buildings were destroyed by fire, and the policy afterwards assigned by the lessees to the defendant, who brought an action on the policy and recovered and received the amount of it from the underwriters.

The plaintiff introduced a witness, S. B. White, who testified to a conversation between himself and the defendant previously to the assignment of the policy to the latter, for the purpose of showing that the assignment was to be for the benefit of all the owners of the property. The defendant objected to the reception of this evidence, but the court admitted it.

Buffum, one of the lessees, whose deposition was put in by the plaintiff, stated, on cross-examination, that he had never

expressed any feelings of hostility towards the defendant, nor threatened to injure him. The defendant, "for the purpose of showing hostile feelings on the part of Buffum towards the defendant," offered the deposition of Henry C. Rogers, in which he testified that, in a conversation between himself and Buffum about a note for \$200, which had just been signed by Buffum and then by the defendant, Buffum said, "I have come it on Ben. Sikes now; he has got the note to pay; I am worth nothing, I took this course to get money out of him"; and "said something in regard to an old insurance affair, in which he had assisted Sikes, and Sikes had paid him nothing therefor, and he had taken this course to get his pay." This deposition was objected to, and ruled out.

The defendant requested the court to rule, that though the lease was of the entire premises, yet "if it was signed by the defendant and Works in their individual capacity," the plaintiff could not recover; and also, "that, as the policy on its face purported to be an insurance of Buffum and Harding's interest, and the assignment to the defendant was unconditional, therefore whatever sum was recovered by the defendant was recovered to his own use, and the plaintiff had no claim thereon."

But the court declined so to rule; and instructed the jury, that "if the defendant and Works leased the whole, and had insurance of the whole, though intended by them to be for their own benefit only, yet the plaintiff would be entitled to one fourth of the sum recovered of the underwriters."

The verdict was for the plaintiff, and the presiding judge reported the case to the full court.

H. Vose, for the defendant. 1. The plaintiff cannot recover in this action on the ground of his being a tenant in common with the defendant and Works of the insured property.

(1.) Because "as tenants in common," they could not lease the interest of their co-tenant, the plaintiff; their lease, though in terms covering the whole property, conveyed only their several interests in it. *Taylor on Landl. & Ten.* § 114.

(2.) Because, as tenants in common, they could not legally insure the interest of the plaintiff; and the policy, though in

Starks v. Sikes.

terms upon the whole property, only covered their interest in the property, and they could only recover under it to the extent of their interest. Angell on Ins. § 82. *Foster v. United States Ins. Co.* 11 Pick. 85. *Finney v. Warren Ins. Co.* 1 Met. 16. *Converse v. Citizens' Mutual Fire Ins. Co.* 10 Cush. 37. *Work v. Merchants & Farmers' Mutual Fire Ins. Co.* 11 Cush. 271. *Catlett v. Pacific Ins. Co.* 1 Wend. 561.

(3.) Because a policy of insurance is not in any way incident to the estate, so as to give any persons legally interested in the estate rights under it, or entitle them to a share of it, other than those to whom it issues, or who may hold it by assignment. *Wilson v. Hill*, 3 Met. 66.

The plaintiff is entitled to recover, if at all, in this action, either because this insurance was originally procured by his direction on his interest; or because the defendant originally intended to protect the plaintiff's interest by this insurance, and the plaintiff has since adopted and ratified the defendant's acts in so doing. The instructions were wrong, because they omitted all these elements, and rested the plaintiff's right of recovery solely on the whole property being included in the lease and covered by the policy, though the policy was intended by the defendant and Works for their exclusive benefit.

2. The effect of the testimony of White was to control and vary the manifest meaning of the assignment of the policy to the defendant, and hence it was incompetent. 1 Greenl. Ev. § 275. The rule excluding parol evidence is not restricted to suits between the parties to the instrument. *Cowen & Hill's* notes to 2 Phil. Ev. (N. Y. ed. 1839) 1436. *Reading v. Weston*, 8 Conn. 117. *Barker v. Buel*, 5 Cush. 519. *Crawford v. Spencer*, 8 Cush. 418. *Myrick v. Dame*, 9 Cush. 248.

3. It was competent for the defendant to show that Buffum had expressed feelings of hostility towards him. 1 Greenl. Ev. § 450. *Atwood v. Welton*, 7 Conn. 66. The deposition of Rogers should have been admitted for that purpose.

D. W. Alvord & G. D. Wells, for the plaintiff.

SHAW, C. J. Assumpsit for money had and received to the plaintiff's use, on the ground that the defendant demanded and

received of an insurance company a sum, to a part of which the plaintiff, in equity and good conscience, was entitled, and therefore that money had and received will lie to recover it.

An estate was owned and held in common, in certain aliquot parts, by the plaintiff, the defendant, and Danforth Works. Works and the defendant, without the concurrence of the plaintiff, undertook to let the entire estate to a third party for a term of time. The two tenants in thus letting the entire estate, including the plaintiff's purparty, did undertake and purport to act as the agents of the plaintiff, and they are estopped to deny it. It might have been competent for the plaintiff to repudiate the assumed agency of his cotenants, and claim possession of his part against the tenant. But it was also competent for him to affirm and adopt the doings of such assumed agents; and then, by a well known maxim of law, the subsequent ratification gives to the agency the force and effect of an original express authority. In the present case it appears, that the plaintiff has affirmed and ratified the doings of his assumed agents, and now claims one of the benefits of it.

One of the stipulations of the lessees was, to procure the whole premises to be insured for the benefit of the lessors, which was done; and the premises were burnt within the time stipulated by the policy. This insurance was in the nature of rent, it was one of the benefits given as a consideration for the demise, and therefore was for the benefit of all the lessees. Perhaps the two nominal lessees, Works and Sikes, should have joined in recovering the loss from the insurers. But they joined in assigning it to Sikes alone, and he alone recovered the whole in his own name. Perhaps if the insurers had objected, he could not have done this; but if they did not, the defendant can certainly take no exception to his own act in that respect. When therefore he recovered the entire loss to which he and his cotenants were entitled, he recovered to their uses respectively, in proportion to their aliquot parts of the common estate, and an action at law will lie for it. *Dickinson v. Williams*, 11 Cush. 258. *Shepard v. Richards*, 2 Gray, 424.

There seems to be nothing in the other exceptions requiring

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special attention. The court are of opinion that the plaintiff is entitled to recover one fourth of the money recovered by the defendant, for loss on the policy, according to his aliquot part in the common property. *Judgment on the verdict.*

INHABITANTS OF WENDELL vs. REUBEN FLEMING & others.

The constable of a town which had voted that the taxes should "on the 1st of October pass into the hands of the constable for collection," gave a bond of that date to the town, reciting that he had been chosen "collector of taxes," and obliging him to pay over to the town treasurer all the taxes which he should be legally required to collect by the assessors. *Held*, that the bond was valid, and estopped him and his sureties to deny the legality of his appointment and the sufficiency of his warrant, in an action on the bond to recover money received by him for taxes and not accounted for.

A bond executed to a town by its collector of taxes, and placed in the hands of the town treasurer, may be enforced against the collector and his sureties, without proof of its approval by the selectmen, pursuant to Rev. Sta. c. 15, § 80, or of its delivery.

ACTION OF CONTRACT upon a bond in the sum of \$3000, dated October 1st 1855, and executed by Reuben Fleming as principal, and the other defendants as sureties, with this condition:

"Whereas the said Reuben Fleming has been chosen collector of taxes for said town of Wendell the current year, and has accepted said office, and been duly sworn to the discharge of his respective duty, now, if the said Reuben Fleming shall, as collector, as aforesaid, faithfully collect, account for and pay over to Otis Chittenden, town treasurer, all the taxes which he shall be legally required to collect by the assessors of Wendell aforesaid, and in accordance with the vote of said town, and fully and finally settle with the treasurer aforesaid on or before the last Tuesday preceding the first Monday of March next, then this obligation to be void, otherwise to be in full force and virtue."

Trial in Franklin at April term 1857, before *Metcalf*, J., who submitted the question of damages only to the jury, and took a

verdict for the plaintiffs, subject to the opinion of the full court upon the following case :

The town records were introduced, and showed the following proceedings: At the town meeting in March 1855, three thousand dollars were raised by vote of the town, and Reuben Fleming was chosen and sworn as a constable. At an adjourned meeting in April, " Voted, to have the taxes collected same as last year." The vote of 1854, thus referred to, was, " Voted, that all persons paying in to the treasurer on or before the 1st of October shall have six per cent. discount; after the 1st of October to pass into the hands of the constable for collection." At the meeting in November 1855, " Voted, that the remainder of the taxes be put up to the lowest bidder. Reuben Fleming bid them off at one per cent., and to give bonds satisfactory to the assessors." At the meeting in March 1856, " Voted, that the selectmen be directed to enforce the collection of the deficit money, if it is not paid within three days, or the bondsmen do not come forward and satisfy for the same." There was no other record as to the choice or oath of a collector of taxes for that year.

The assessors made out a list of the taxes assessed, amounting in all to \$3041.34, and delivered it, with a warrant addressed "to Otis Chittenden, Treasurer and Collector of the Town of Wendell," to said Chittenden. He received taxes until the 1st of October, amounting to \$1873.21. Immediately after the November town meeting, the assessors put the same list into Fleming's hands without any new warrant. He proceeded to collect taxes to the amount of \$817.32, of which he paid over \$279.33, and never accounted for the balance.

There was evidence that, after the bond was signed, one of the assessors, who was present at the signing, took it, and that it was delivered the same day to the town treasurer, in whose possession it afterwards remained.

No other evidence was offered by the plaintiffs. No evidence was offered by the defendants.

D. W. Alvord & G. D. Wells, for the defendants. 1. The bond declared on is void. The statutes authorize only the

taking of a bond to perform faithfully the duties of the office of collector, or constable; and provide that "every collector shall give bond to the town, in such sum as the selectmen shall require, and with sureties to their satisfaction, for the faithful discharge of the duties of his office." Rev. Sts. c. 15, § 80. But in this case it does not appear that the sum or the sureties were approved by the selectmen; or that the bond was ever delivered to or accepted by the selectmen or the assessors. The vote of the town that Fleming should give bond satisfactory to the assessors cannot affect the provision of the statute.

2. This bond, as well as the Rev. Sts. c. 8, § 1, bind Fleming to collect only such taxes as he has a warrant from the assessors to collect. But the only warrant issued in this case was to Otis Chittenden, town treasurer; and any taxes collected by the defendant under that warrant were collected by him as Chittenden's agent, and he is responsible for them to Chittenden.

3. The bond declared on states that Fleming had been chosen collector; but the proof is that he was chosen constable. The recital in the bond does not estop the defendant to prove the contrary by public records.

C. Allen, for the plaintiffs.

DEWEY, J. No collector having been appointed at the annual meeting holden in March 1855, by force of Rev. Sts. c. 15, § 33, Fleming, as constable duly qualified for that office, became the collector. The vote of April 1855, ordering the collection of taxes "same as last year," is found, by reference to the previous vote, to authorize the taxes after the first of October to pass into the hands of the constable for collection, thus giving direct authority to Fleming to collect such taxes as remained uncollected on the first day of October 1855. The bond given by the defendant is adapted to meet this state of things. Nor does the form of the recital in the bond, that "said Reuben Fleming has been chosen collector of taxes," affect the validity of the bond. Fleming was confirmed in the office of collector by the proceedings in November 1855, when it was voted "that the remainder of the taxes be put up to the lowest bidder," and Reuben Fleming was such lowest bidder, so far as that mode of electing a collector had any

validity. Assuming, however, that it had none, it still left him as collector by reason of his holding the office of constable. *Howard v. Proctor*, 7 Gray, 132. Fleming had given no other bond than that of the date of October 1st 1855, the same now in suit. This bond is apparently appropriate to an appointment to take effect on the 1st of October. To have reference to the vote of November subsequently, we must suppose it was redelivered. This may be so. In either aspect of the case, it was a bond to secure the faithful performance of the duties of Fleming in collecting and paying over to the town the remainder of the taxes uncollected by the town treasurer on the 1st of October.

As to those taxes, it is further objected that there was no special warrant to Fleming directing him to collect them, but they were placed in his hands with the same warrant with which they had been delivered to the town treasurer, directed to "Otis Chittenden, Treasurer" &c. But this furnishes no objection to charging the sureties for the neglect of Fleming in not paying over moneys he actually received for taxes, if it were otherwise as to any claim for damages for his omission to collect taxes.

He was *de facto* the collector of the taxes remaining unpaid on the first day of October 1855. He had as such received the tax bills for collection. He received large sums acting in the capacity of collector. To secure to him the benefits of such collectorship, and the receipt of the tax bills for collection, the defendants gave the bond in suit; and, in the opinion of the court, when called upon to account and pay over the money actually received by him as a collector of such taxes, the defendants are estopped to deny the legality of his appointment or the sufficiency of the form of the warrant under which he collected the same.

The bond was duly executed by the defendants and placed in the hands of the town treasurer, and is not now to be avoided by any allegation that the amount of the same was not fixed by the selectmen, and taken with sureties to their satisfaction; or that it was not delivered directly to them. The provisions in the Rev. Sta. c. 15, § 80, are directory as to the manner of giving bonds by one appointed collector; and the collector may

properly refuse to give a bond in any greater sum than the selectmen require. But if a collector voluntarily gives a bond to the town to secure his faithful discharge of the duties of the office of collector, and the same is accepted, it is a good and valid bond without any further evidence of the approval by the selectmen, of the sum, or the sureties.

The case of *Sweetser v. Hay*, 2 Gray, 49, is to the effect that an informal bond given by a collector of taxes to the selectmen of a town, may be enforced as a valid bond for the benefit of the town in the name of the selectmen. The position there taken is, that such bond is not to be avoided because not taken in strict conformity with the provisions of the revised statutes.

Judgment on the verdict

MARK WOODWARD vs. MICHAEL PICKETT.

A conveyance of land in fee, taking back a bond to reconvey upon repayment of the consideration money, and to permit the obligee meanwhile to occupy, paying rent equal to interest on that sum, is a mortgage.

A mortgagee who is not in actual possession, and has not entered for foreclosure, cannot maintain trespass against a railroad corporation owning the equity of redemption for cutting grass on land within the location of their railroad.

ACTION OF TORT for breaking and entering the plaintiff's close and cutting and carrying away grass there growing. The parties submitted to the decision of the court the following case :

On the 30th of April 1844 the close in question, being then owned by Artemas H. Washburn, and subject to a mortgage from Susanna Mattoon, a former owner thereof, to Philip Hall and others, trustees, was conveyed by said Washburn to said Hall and others in fee, in consideration of \$700, taking back a bond to reconvey the land to him upon repayment of that sum, and meanwhile to lease the land to him at an annual rent of \$42; and this bond has been since assigned to the plaintiff.

On the 11th of November 1848 Washburn conveyed to the Vermont and Massachusetts Railroad Company a strip of land

across the close in question and within the location of their railroad, and the company sold the grass growing thereon to the defendant, and he entered and, notwithstanding the plaintiff's prohibition, cut grass to the value of three dollars, within the fences built by the company on each side of the railroad. There was no evidence that the plaintiff was in possession at the time of the alleged trespass, except that he was in possession of the lot on each side of the track.

A. Brainard, for the plaintiff.

C. Allen, for the defendant.

BIGELOW, J. The conveyance by Washburn to Hall and others, trustees, dated April 30th 1844, and the bond from said Hall and others to Washburn, of the same date, by which they agreed to reconvey the same estate to Washburn on the payment of \$700 in seven years, were parts of one and the same transaction, and constituted a mortgage. *Taylor v. Weld*, 5 Mass. 109. *Lanfair v. Lanfair*, 18 Pick. 299. *Nugent v. Riley*, 1 Met. 117. It does not alter the nature of this transaction, that Hall and others, trustees, held a previous mortgage on the same premises, from Susanna Mattoon, a former owner of the estate. The only effect of this prior mortgage was to make the conveyance of April 30th 1844, in connection with the bond, a second mortgage. Washburn was therefore owner of the equity of redemption, and by his deed of a portion of the estate to the Vermont and Massachusetts Railroad Company conveyed the right to redeem that part to the corporation. The facts show no foreclosure of either of the mortgages, nor any entry on the *locus in quo* for the purpose of foreclosure by the mortgagees. The corporation were therefore in the actual possession of the premises as owners of the equity, and had a right to the annual crop, and to authorize the defendant to take it. For this taking it is clear that the mortgagee, the present plaintiff, cannot maintain trespass. *Page v. Robinson*, 10 Cush. 99.

Judgment for the defendant.

LIMA F. ROOT vs. KENDALL BANCROFT & others.

A bill in equity by a grantor, to avoid a deed which he has been induced to execute by fraud of the owners of other interests in the land, cannot be sustained without averring that the grantee had notice of the fraud or paid no valuable consideration for the deed.

BILL IN EQUITY by the widow of Jesse Root, to set aside releases of her interest in her husband's lands, on the ground that she was induced to execute them by the gross fraud and imposition of Abel Bancroft, his executor, and his residuary legatees. The bill averred that the plaintiff's interest in part of the land was released to the residuary legatees, and was now owned by them and by S. S. Holton, H. H. Holton and S. D. Cummings; and that her interest in another part was released directly to Bowditch Montague and Abel Benjamin; and made all these persons, as well as the executor and residuary legatees, parties; but did not aver that the Holtons, Cummings, Montague or Benjamin had any knowledge of the fraud. And they demurred generally to the bill.

D. W. Alvord, for the defendants, cited 1 Story on Eq. §§ 57, 381, 409; *Bean v. Smith*, 2 Mason, 272, 279; *Jerrard v. Saunders*, 2 Ves. Jr. 458; *Johnson v. Johnson*, 3 Met. 63; *Green v. Tanner*, 8 Met. 411.

C. Allen, for the plaintiff. 1. If the present owners can defend at all, it is only by plea and proof of payment of the full consideration, and that the conveyances to them were without notice. Story Eq. Pl. § 604 *a*. *Wood v. Mann*, 1 Sumner, 506. *Boone v. Chiles*, 10 Pet. 212.

2. The deeds of Montague and Benjamin, having been procured by fraud, may be set aside in equity, not only as to the person who practised the fraud, but as to third persons who have acquired interests under them, though perfectly innocent. *Whelan v. Whelan*, 3 Cow. 537. *Huguenin v. Basely*, 14 Ves. 273. *Bridgman v. Green*, 2 Ves. Sen. 627.

MERRICK, J. Upon examination of the allegations in the bill, we are unable to find any ground upon which it can be

maintained, or any just cause whatever of complaint against either of the parties who have demurred to it. It sets forth the acts and conduct of Abel Bancroft, which are charged to have been unjust and fraudulent towards the plaintiff, in procuring from her conveyances of the estates of which those parties are now in possession under deeds thereby executed; but it does not allege that either of them, directly or indirectly, actually or constructively, committed any fraud, or was connusant, or had any reasonable cause of suspicion of the commission of it by others. Upon such a statement as this, it is impossible to break in upon their title to the property or to disturb them in the enjoyment of it. It is a rule not less in courts of equity than in courts of law, that fraud is not to be presumed; it is a fact to be established by proofs before it can be assumed as the basis of a judgment or of any judicial action affecting the rights of any owner of property. 1 Story on Eq. § 190. But where, as in the present case, there is no allegation or suggestion of fraud against the persons who are now in possession of the estates which the plaintiff seeks to recover, there can be neither proof nor defence; for there is no averment on the subject which can be either established or denied, or to the truth or falsehood of which evidence could be adduced. It is a reasonable and fixed principle of law, that *bona fide* purchasers for valuable consideration, without notice of any sinister or fraudulent practices by which conveyances may have been induced, are always to be carefully protected. 1 Story on Eq. § 381. And he may safely be presumed to have acted in good faith, and to have paid the valuable consideration expressed in the deed under which he derives his title, and the receipt of which is therein expressly acknowledged, to whom no fraud or knowledge of fraud, or any want of fairness or integrity in dealing, is imputed. Such is the condition of the defendants who have demurred to the plaintiff's bill; and as against them, it must therefore be dismissed.

ARVIN N. CRITTENDEN vs. EUGENE FIELD & another.

This court has jurisdiction in equity to restrain the obstruction of a mill privilege by another mill on the same stream.

An order of a single judge of this court, sitting in equity, directing an issue of fact to be tried by a jury, is not open to exception.

A conveyance of one of two ancient mills, which comprise the entire mill privilege of a stream, carries with it such a proportion of the whole right in the stream as the water used to drive the mill conveyed bears to that used by the other mill.

Under a grant of a mill privilege, "commencing at a certain permanent rock on which the upper dam belonging to the grist mill now stands, thence running on said brook to the dam occupied for supplying water to the grist mill, with the privilege of erecting buildings on the adjacent land belonging to the grantor, for any purpose except for a grist mill and saw mill, for the occupation and use of any other machinery carried by water power, reserving therefrom the right of taking water from the said upper dam to the grantor, also reserving to the grantor the land on said brook one hundred feet below said permanent rock," the grantee has no right to raise the water above the permanent rock, or to erect a dam within one hundred feet of the upper dam.

Deeds of land bounding on a stream do not affect previous independent conveyances of all the water power therein.

The admission of parol evidence corresponding with the legal interpretation of a deed is no ground of exception.

ACTION OF TORT, under *St.* 1853, *c.* 371, praying for damages and for other relief in equity, by the owner and occupant of a water privilege on Mill Brook in Charlemont, "extending," as he alleged, "from the grist mill dam, so called, to and above the upper dam, so called, with all the water power created by and rightfully to be used with both said dams," subject to a right of the defendants to construct and maintain a dam between these two, and not within one hundred feet of the upper dam, nor so high as to affect the water power created by the upper dam, or to obstruct the natural flow of the water above a certain permanent rock lying westerly of the centre of the brook, and constituting a part of the foundation of the upper dam; which limits, the plaintiff alleged, the defendants had exceeded in a dam maintained by them for ten years; and thereby injured the plaintiff's mills.

The defendants answered, setting up a right to do all that they had done, and denying all the plaintiff's allegations; and at the hearing before *Metcalf, J.*, in Franklin at September term

1857, before the case was sent to the jury, "objected to being sent to the jury on issues of fact, and moved that the case be dismissed, because it appeared upon the face of the declaration and answers that there was a dispute as to the title in a water privilege; and also because it appeared that the defendants had been in possession at least ten years, and relief was not sought to prevent irreparable damage; and also because the plaintiff had adequate remedies at law, if he had sustained any damage." But the court refused to dismiss the complaint, and ordered the parties to go to the jury upon these issues: "The jury shall find whether the plaintiff has a water privilege, as alleged in his complaint, and also whether said privilege has been obstructed by the defendants, or either of them, as alleged in the complaint, and what damage, if any, the plaintiff has sustained from such obstruction."

The evidence of title was as follows:

In 1788, Sylvanus Rice, being the sole owner of the water privilege, conveyed to Jonathan Hawks about ninety acres of land, "together with a grist mill and saw mill, and the privilege of the stream upon which they stand, eighty rods below the south line of Hawks's forty acre lot, so called, through which it runs, with liberty to use and improve said stream for mills of all sorts within the eighty rods, with liberty to pass and repass by such ways and means as are convenient, with convenient yard room for the use of mills of all sorts."

In 1793, Jonathan Hawks conveyed to Artemas Rice, 2d, "one half of a saw mill and half the privilege of the stream on which it is set," "together with liberty to use and improve said stream for mills of all sorts as far up as the tail of the grist or corn mill standing on said stream, and as far down said stream as the distance of eighty rods below the south line of Jonathan Hawks's farm," &c., with liberty to pass and repass, and "with convenient yard room for the use of the mill." The interest of Rice came by mesne conveyances to David Crittenden in 1846.

In 1804 Jonathan Hawks conveyed to Silas Beckwith the grist mill, with all the grantor's right to the mill stream, subject

to Rice's right to take water from the upper dam for the use of his saw mill, when it would not injure the grist mill; Beckwith "to have sufficient room for mill yards, dams and ponds, and the command of the upper pond only the reserve made for Rice." Beckwith's interest came by mesne conveyances to Simeon Crittenden, who on the 16th of March 1816 conveyed to David Crittenden the grist mill, "with the full use of the stream of water," subject to Rice's privilege as above.

In 1826 David Crittenden, being thus possessed of the grist mill, and having otherwise acquired title to the one half of the saw mill which had not been conveyed to Rice, conveyed to Silas Hawks and others the grist mill and land attached thereto, and all water privileges which were conveyed to him by Simeon Crittenden, and also one undivided half of the saw mill which he owned in company with Artemas Rice, and all the privileges conveyed to him therewith.

By two deeds dated July 21st 1834 said Silas Hawks and others conveyed to William Patch and Eugene Field "a certain water privilege, commencing at a certain permanent rock westerly of the centre of said brook, on which the upper dam belonging to the grist mill now stands, and thence running on said brook to the dam which is occupied for supplying water for the grist mill, with the privilege of erecting buildings on the adjacent land for any purpose, except a grist mill and saw mill, for the occupancy and use of any other machinery carried by water power; reserving the right of taking the water from said upper dam to ourselves; also reserving to ourselves the land on said brook one hundred feet below said permanent rock, and also the right of raising the grist mill dam one foot higher than it now is." This privilege is now by mesne conveyances vested in the defendants.

In 1841 said Silas Hawks and others conveyed to David Snow "a grist mill erected by David Crittenden, with all the land attached thereto, and the right of the road leading thereto, and all the water privileges which the said David Crittenden owned on said stream, conveyed to him by Simeon Crittenden March 16th 1816, excepting the water privilege sold to Eugene

Field; and also the first privilege in the saw mill of drawing water sufficient to carry a carding machine;" and also the saw mill and all privileges conveyed therewith to David Crittenden. Snow's interest became vested by mesne conveyances in David Crittenden in 1848.

In 1852 David Crittenden conveyed to David B. Crittenden "one half of my grist mill and saw mill, and lands thereto belonging"; and in 1853 he conveyed to the plaintiff "one undivided half of the grist mill and one undivided half of the saw mill, together with one undivided half of the water privileges, lands and appurtenances thereto belonging." And David B. Crittenden's half of the grist mill was since conveyed to the plaintiff.

In 1854 the plaintiff and David B. Crittenden conveyed to Bishop the saw mill, "with all the privilege of the stream on which said mill stands, together with liberty to use and improve said stream for mills of all sorts except grist mills, which we reserve for our own use and benefit on the grist mill privilege above."

In 1804, Quartus Rice conveyed to Joseph White the land on the west side of the brook, and bounding "on the brook," from a point above the upper dam to a point below the saw mill. In 1817 Jonathan Hawks conveyed to Urbane Hitchcock a farm, which included land on the eastern bank of the stream, from the line of the upper dam to a place below where the defendants' dam now is; with no reservation in the deed. This land, by mesne conveyances, came to the defendants in 1849.

A part of the western portion of the dam built by the defendants was less than one hundred feet from the upper dam, and the dam so erected by the defendants raised the water at, about or above the permanent rock referred to in the deeds of Hawks and others to Patch and Field, to the height of ten feet above the ordinary level of the water as it stood when said deed was given. The power of using the upper dam for any purpose, excepting as a reservoir, was impaired or destroyed in value by the setting back of the water as aforesaid; and the plaintiff contended that its value even for that purpose was destroyed.

There was no evidence of any occupation for fifty years by the owners of the grist mill, on either side of the stream, between the grist mill and the upper dam, except by passing along the bank to repair and regulate the flow of water from the upper dam, and by building and using a carding mill above the grist mill; but it appeared that both banks of the stream had been occupied for agricultural purposes, by Jonathan Hawks and his assigns and Joseph White and his assigns, except so far as occupied for manufacturing purposes. It did not appear that any use of the water privilege had ever been made by the owners of the adjacent lands, unless claiming under deeds of the mill privileges; or that the privilege created by the upper dam had ever been used except as a reservoir to the grist mill.

There was parol evidence that the reservation in the deed of Hawks and others to Patch and Field was expressly stated at the time of the execution of the deed in Patch's hearing, and was known to Field when he took the deed, to be intended to save to the grantors a privilege just below the upper dam.

It appeared that the defendants' dam materially impaired the value of this privilege thus intended to be reserved; and there was conflicting evidence upon the question, whether the defendants' dam obstructed the working of the grist mill.

Upon this evidence the defendants contended, 1st. That the plaintiff had not chosen an appropriate remedy; 2d. That the limitations in the deeds to Patch and Field, under which they claimed, did not legally restrain them from constructing a dam within one hundred feet of the upper dam of the plaintiff, nor from raising the water at, about and over the permanent rock described in said deed; 3d. That the reservation of the land on the brook, one hundred feet below the permanent rock, was inoperative and void; 4th. That, since acquiring title in the privilege from Hawks and others, they had acquired a good title to the eastern bank of the brook, including the one hundred feet reserved, and as far up as the upper dam, and had thus acquired a right to maintain their dam at its present height.

On the whole evidence the court ruled, that the plaintiff had proved his title to such a privilege as he claimed against the de-

fendants ; and that the jury, if satisfied that the plaintiff had been injured by any acts of the defendants, should return their verdict for such damages as he had sustained. The jury returned a verdict for the plaintiff, and the defendants alleged exceptions.

S. T. Field, for the defendants.

G. T. Davis, for the plaintiff.

BIGELOW, J. This case is clearly within the equity jurisdiction of this court. *Bemis v. Upham*, 13 Pick. 170. *Ballou v Hopkinton*, 4 Gray, 328. It has been heard before a single judge, and an issue to try certain questions of fact has been directed by him. It was within his discretion to decide on the motion of the plaintiff for an issue to the jury ; and his order for such issue is not open to exception. *Ward v. Hill*, 4 Gray, 593.

The questions raised at the trial concerning the respective rights of the parties to the mill privileges in controversy depend entirely on the construction of certain deeds.

1. The entire right to the use of the water of the stream was originally vested in Sylvanus Rice, who in the year 1788 conveyed all his title thereto to Jonathan Hawks. In this deed the privilege was described "as a grist mill and saw mill, and the privilege of the stream, with liberty to use and improve said stream for mills of all sorts." This ancient right to the use of the water in the stream was, at the time of this grant, well described and designated by the use to which it was then appropriated. The grist mill and saw mill, being the only mills then erected, with the dam across the brook necessary to raise the head of water, comprehended the entire privilege. By the conveyance therefore of these two mills, the entire mill privileges passed to the grantee ; and when either of the two was separately conveyed, such proportion of the whole right in the brook passed by the grant, as the water used to drive the mill conveyed bore to that used by the other mill. If, for example, the grist mill required as much water as the saw mill, a grant of the former would convey one half of the entire privilege ; and so in a greater or less proportion, according to the amount of water necessary to carry the mill.

It follows, that when the grist mill was conveyed by Simeon

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Crittenden, who had acquired a title to it through mesne conveyances from Jonathan Hawks, by his deed to David Crittenden of March 16th 1816, the grant comprehended all the water in the brook except the saw mill privilege. This right is by mesne conveyances now vested in the plaintiff, subject, however to be diminished by such right of water as shall be found to have been conveyed to the defendants by the deeds under which they claim title. The right of the plaintiff includes the upper or reservoir dam, which was proved at the trial to have been occupied and used for more than fifty years as a reservoir dam for the grist mill below.

The argument of the defendants' counsel upon the construction of the deed from Simeon Crittenden to David Crittenden of March 16th 1816, and also of the deeds of David Crittenden and David B. Crittenden, under which the plaintiff claims title, is founded on the fallacy that the conveyance of the grist mill passed nothing but the mill itself, and the water actually necessary to drive it. This would be so, if the title of the plaintiff rested on a modern grant of a grist mill, situated on a stream where there were several mills of different kinds, all drawing from the same level, and where there was only sufficient water to supply the power necessary to drive each mill.

But the argument has no application to a case like the present, where the right of a party is traced back to an ancient privilege, embracing the entire water in a stream, described and designated by the kind of mills to which it was originally appropriated. In such case, the conveyance of a grist mill or saw mill, *eo nomine*, passes the entire proportion or share of the water in the river belonging to such mill. The plaintiff therefore, having by his deeds a title to the ancient grist mill, is the owner of so much of the water power and privileges in the stream as do not belong to the ancient saw mill, which, at the time of the trial, was vested in Bishop, by deeds dated in the year 1854; and also subject to such deduction or diminution, if any, as ought to be made therefrom by reason of the grant of a water power, made by the owners of the original saw mill and grist mill privileges, under which the defendants now claim title.

2. Their right is derived from deeds made by Silas Hawks and others to William Patch and Eugene Field, dated July 21st 1834. The grantors in these deeds undertook thereby to carve out a privilege lying between the upper or reservoir dam and the grist mill dam. The title of the defendants depends on the nature and extent of the privilege thus granted. It is a grant of a privilege described as follows: "Commencing at a certain permanent rock westerly of the centre of said brook, on which the upper dam belonging to the grist mill now stands; thence running on said brook to the dam which is occupied for supplying water to the grist mill, with the privilege of erecting buildings on the adjacent land to us belonging, for any purpose except for a grist mill and saw mill, for the occupancy and use of any other machinery carried by water power; reserving therefrom the right of taking water from the said upper dam to ourselves, also reserving to ourselves the land on said brook one hundred feet below said permanent rock."

The privilege thus conveyed was clearly limited by the "permanent rock" above and the grist mill dam below. No right was given to raise water above the rock. On the contrary, we think it was excluded by necessary implication. The rock is not only the upper boundary of their privilege, but the intent of the grantors to limit the right of the grantees by it is shown by the terms of the reservation. The object of the grantors was not to impair the power created by the upper dam. By reserving in the deed the use of the water raised by this dam to themselves, they intended to restrict the grant, so that the privilege conveyed should not disturb the flow of the water below the dam beyond the point fixed by the rock. The reservation could have no other object. The dam and the water raised by it belonged to the grantors. No part of it was included in the conveyance to Patch and others. It was not therefore a reservation, in the strict sense of the word, out of the thing granted; but was inserted for the purpose of excluding any right which might, under the general words of the grant, be claimed to flow back on the dam above the rock and thereby diminish the fall of the water. This construction is strengthened by the addi-

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tional reservation of one hundred feet of the bank of the stream below the permanent rock. This was, in the strict sense of the word, a reservation of that which would otherwise have passed to the grantees under the previous terms of the grant, and was doubtless intended to save to the grantors a portion of the bank of the brook immediately below the dam, on which they might erect mills for the purpose of there using the water power created by the upper dam, and which they had intended to reserve by the previous clause in the deed.

3. We see no evidence in the case from which any abandonment of the right of water originally belonging to Jonathan Hawks can be inferred. The conveyance of Rice to White, relied on by the defendants to prove such abandonment, as well as that of Hawks to Urbane Hitchcock, under which the defendants claim title, were grants of land only on the stream, without any right to the use of the water. The mills and privileges were included in other conveyances, as appurtenances to other land, and passed by separate and independent titles under deeds previously made.

4. The parol evidence admitted at the trial as to the understanding of the parties concerning the extent of the right conveyed to Patch and others by the deed of July 1834, does not appear to have been objected to at the trial. But its admission was wholly immaterial, because the legal interpretation of the deed, unaided by extrinsic proof, conforms to the parol evidence of the intent of the parties in making and receiving the grant.

Exceptions overruled.

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ABANDONMENT.

See INSURANCE, 12, 14 ; SEAMAN.

ACTION.

1. A railroad corporation, who erect a fence on their own land, to keep the snow from being blown upon their road, are not liable for the damages occasioned by the accumulation of snow upon another's land on the other side of the fence. *Carson v. Western Railroad*, 423.
2. An action for injuries occasioned to land of an abutter by acts done by direction of a surveyor of highways in digging a watercourse in a highway with the approbation of the selectmen cannot be supported by evidence that the surveyor acted wantonly and with the intention of injuring the plaintiff, or that the acts done were not necessary to the repair of the way. *Benjamin v. Wheeler*, 409.
3. A child, living in its father's house, cannot maintain an action against a gas company for injury occasioned to it at night, by the gas escaping from their gas pipes in the street opposite the house, over which the child and its father have no control, without proving want of ordinary care on the part of the company in keeping the pipes in repair, and ordinary care on the part of itself and its father; and any want of ordinary care in the father will defeat the action in the same manner as it would in the child, if of full age. And if the father knew of the leak early enough in the previous day to have had it repaired before night, by giving immediate notice to the company; or if the father, finding the escape of gas in the house at night to be dangerous, did not use ordinary care in withdrawing the child from the effects, by removing it out of the house, or otherwise; the action cannot be maintained, although the company's negligence contributed to the injury. *Holly v. Boston Gas Light Co.* 123.
4. A ferryman's liability to an action for a loss occasioned by his negligence is not affected by the Rev. Sta. c. 26, § 5, giving a remedy by action on his bond to the county commissioners. *Miller v. Pendleton*, 547.

See CONTRACT, 1 ; DAMAGES, 3 ; PRINCIPAL AND AGENT ; PROMISSORY NOTE, 5 ; WRIT OF ENTRY, 1, 3.

ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADVERSE POSSESSION.

See EVIDENCE, 11.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

AMENDMENT.

1. A writ against one personally may be amended by leave of court, so as to charge him in his capacity as administrator. *Lester v. Lester*, 437.
2. A declaration alleging two considerations for a contract may be amended in this court, after a verdict taken in the court of common pleas on proof of one only, and exceptions on that ground, by striking out the consideration not proved, the plaintiff taking no costs since the trial. *Stone v. White*, 589.

See EXCEPTIONS, 2; INSOLVENT DEBTORS, 6; VARIANCE, 2.

APPEAL.

No appeal lies from the determination of the court of common pleas under the Rev. Sta. c. 107, § 5, of the amount for which conditional judgment shall be entered on a writ of entry to foreclose a mortgage, unless the record shows that a question of law was involved. *Scoville v. Smith*, 438.

See JURY.

ARBITRAMENT AND AWARD.

A submission to arbitration under the Rev. Sta. c. 114, executed and acknowledged by one partner in behalf of his firm is void; and a judgment rendered on the award will be reversed on error. *Horton v. Wilde*, 425.

ASSAULT.

An indictment sufficiently charges a felonious assault with a dangerous weapon, by averring that the defendant, "being armed with a dangerous weapon, to wit, a gun loaded with powder and shot, and capped, in and upon J. S. an assault did make, with the felonious intent the said J. S. with said gun to kill and murder, by feloniously," &c. "discharging said gun at said J. S., and by feloniously," &c. "beating, bruising and wounding the said J. S. with said gun, and thereby giving to said J. S. one mortal wound," &c.; and is supported by evidence of such an assault and attempt by discharging the gun at J. S., or by beating J. S. with the gun. *Commonwealth v. Creed*, 387.

ASSESSMENT.

See CORPORATION, 2-5.

ASSIGNMENT.

An assignment and delivery in New York by a citizen of New York to a citizen of Massachusetts of property there, to be sold by the assignee and applied *pro rata* to the payment of certain acceptances of the assignor held by citizens of Massachusetts and Rhode Island, are valid, and the assignee will hold the proceeds of the sale against a creditor attaching them in his hands in this state *Goddard v. Winthrop*, 180.

ASSUMPSIT.

See CONTRACT.

ATTACHMENT.

1. A watch upon a debtor's person is not liable to attachment; and an officer who, upon its being handed to him by the debtor, merely to be looked at, and while still annexed to a silk guard which passes around the debtor's neck, severs the guard and attaches the watch, is a trespasser. *Mack v. Parks*, 517.
2. Where a building is leased in distinct portions to several tenants, who have exclusive occupation and control of their respective tenements, and use in common the entry and stairway, an officer who has entered through the outer door of the house into the entry has no right to break open the door of one of the rooms of a tenant who occupies all the rooms on both sides of the entry on the third floor of the house, in order to attach the property of a third person therein. *Swain v. Mizner*, 182.

See INSOLVENT DEBTORS, 4.

ATTORNEY AND COUNSEL.

1. Under the Rev. Sta. c. 13, § 40, authorizing the court, "in the absence of the district attorney," to appoint a district attorney *pro tempore*, the court may make such an appointment when the office is vacant. *Commonwealth v. King*, 501.
2. When the testimony in a criminal case consists of a great number and variety of circumstances, with which the acting district attorney is unfamiliar, the court may appoint other counsel, acquainted with the facts, to assist him. *Ib.*
3. It is no objection to the appointment of additional counsel for the Commonwealth, on an indictment for burning a building, that he conducted the prosecution before a magistrate, and was clerk of a fire inquest on the building under St. 1854, c. 424. *Ib.*

AUDITOR.

See EVIDENCE, 4; EXCEPTIONS, 4.

BANK.

See PROMISSORY NOTE, 3.

BILL OF LADING.

A shipment of goods by the owner, under an agreement by which the consignee has advanced money thereon, and agreed to make a further advance on receiving the bill of lading, gives the consignee a title to the goods to secure both advances, as against one who afterwards, though before this bill of lading is delivered, receives a second bill of lading of the goods, with notice that the first has been issued. *Stevens v. Boston & Worcester Railroad*, 262.

See PLEADING, 1.

BOND.

1. A bond to give to the obligee "within twenty months from this date a good operative deed to five hundred and twenty five acres of land in T., from any land owned by W. at the time of his decease, except such land as may be sold at this date," *it seems*, contains an implied covenant that that amount of W.'s land remains unsold, and is broken if there is no such land at the date of the bond. And if the obligor owns such land at the date of the bond, it is the obligee's right and duty to select that number of acres in such reasonable time before the expiration of the twenty months as will enable the obligor within that time to prepare a deed of the land selected; but the obligee is not limited to a single tract, provided he does not divide more than one tract; nor required to make his selection in such time as to enable the obligor to repurchase lands sold since the date of the bond, or to free the lands from incumbrances; and upon a failure to convey any land at all, the measure of damages is the value of such land as the obligee might have selected. *Loomis v. Wadhams*, 557.
2. The holder of a bond issued by a railroad corporation, payable "to ———," and subsequently confirmed by the legislature, may sue thereon in his own name. *Chapin v. Vermont & Massachusetts Railroad*, 575.
3. A railroad corporation issued bonds payable "to ———," and purporting on their face to be secured by a mortgage of the same date to trustees of all the property of the corporation; and such a mortgage was in fact executed. The legislature afterwards ratified and confirmed "the proceedings" of that date, "whereby said corporation conveyed their said railroad property in mortgage to" certain persons, "trustees for the bondholders in said mortgage mentioned, to secure the holders of said bonds the payment of the same." *Held*, that these bonds were thereby confirmed, and might be sued upon in the name of any holder. *Ib.*

See COLLECTOR OF TAXES; EXCEPTIONS, 3; MORTGAGE, 1; POOR DEBTORS; SALE, 7.

BOOK ACCOUNT.

See EVIDENCE, 16-18.

BOUNDARIES.

See EVIDENCE, 10.

BOWLS.

1. A statute prohibiting the use of bowling alleys after six o'clock on Saturday afternoons is constitutional. *Commonwealth v. Colton*, 488.
2. An indictment or complaint on *St.* 1855, c. 429, § 1, for illegally keeping open a bowling alley, need not allege that it was done for gain. *Ib.*

BUILDING.

See CONTRACT, 2; INSURANCE, 1, 2; LARCENY, 3.

CARRIER.

1. A common carrier, receiving goods from a wrongdoer, has no lien thereon against the rightful owner, even for freight which he has paid to a previous carrier, by whom the owner had directed them to be carried. *Stevens v. Boston & Worcester Railroad*, 262.
2. When a portion of goods shipped by one entire contract of affreightment is lost by fault of the carrier, and the residue sold by him by the bill of lading at the port of delivery, without knowing such loss, the carrier, if sued by the consignee for money had and received from the proceeds of the sale, cannot deduct the freight; but may deduct a discount allowed by him to the purchaser on discovering the deficiency in the goods. *Stevens v. Sayward*, 215.
3. The provision of *St.* 1851, c. 147, § 5, that in any action "brought by a passenger against any railroad corporation, steamboat proprietor or other common carrier," the plaintiff, after proof of the bailment of his trunk to the defendants, and of its loss "by the fault of such carrier, or of the agents of such carrier," shall be allowed to put in evidence a descriptive list of its contents, sworn to by himself, applies to the case of the loss of a trunk left by the passenger with the baggage master of a railroad corporation, after arriving at his place of destination. *Harlow v. Fitchburg Railroad*, 237.

See ACTION, 4; PLEADING, 1.

CASES OVERRULED, DOUBTED OR DENIED.

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|---|-------------------------------------|
| M'INTYRE v. PARKS, 3 Met. 297. | <i>Webster v. Munger</i> , 587 |
| REX v. PUCKERING, 1 Moody, 242, and 1 Lewin, 302. | <i>Commonwealth v. Beaman</i> , 500 |
| ROBERTS v. HOLT, 2 Show. 443. | <i>Blanchard v. Page</i> , 291 |

CHURCH.

See PARISHES AND RELIGIOUS SOCIETIES.

COLLECTOR OF TAXES.

1. A bond, the execution of which is admitted, reciting the principal obligor's appointment as collector of taxes, is sufficient evidence of his being such collector in an action on the bond against him and his sureties, to recover money received by him for taxes and not accounted for; notwithstanding oral evidence that the office was put up at a town meeting for sale by auction, and

was bid off by another person in his absence for him. *Inhabitants of Great Barrington v. Austin*, 444.

2. The constable of a town which had voted that the taxes should "on the 1st of October pass into the hands of the constable for collection," gave a bond of that date to the town, reciting that he had been chosen "collector of taxes," and obliging him to pay over to the town treasurer all the taxes which he should be legally required to collect by the assessors. *Held*, that the bond was valid, and estopped him and his sureties to deny the legality of his appointment and the sufficiency of his warrant, in an action on the bond to recover money received by him for taxes and not accounted for. *Inhabitants of Wendell v. Fleming*, 613.
3. A bond executed to a town by its collector of taxes, and placed in the hands of the town treasurer, may be enforced against the collector and his sureties, without proof of its approval by the selectmen, pursuant to Rev. Sts. c. 15, § 80, or of its delivery. *Ib.*

COMPLAINT.

A complaint duly charging an offence, certified in the usual form, by the magistrate to whom it was presented, to have been sworn to by the complainant, cannot be affected by evidence that there was no further examination of the complainant on oath before issuing the warrant. *Commonwealth v. Farrell*, 463.

See JURISDICTION, 2, 3.

CONDITION.

1. A manufacturing corporation, authorized by their charter to hold real estate, granted land upon condition "that no building or part of any building thereon shall ever be occupied or used for the sale of spirituous liquors." A grantee of their grantee leased parts of the land with buildings thereon to different persons, one of whom sold spirituous liquors in his tenement, without the participation, knowledge or assent of his lessor. *Held*, that this did not entitle the corporation to enter for breach of the condition in their deed. *Indian Orchard Canal Company v. Sikes*, 562.
2. Waiver of a condition in a deed may be proved by parol evidence. *Leathe v Bullard*, 545.

See EXCEPTIONS, 4; SALE, 4.

CONSIDERATION.

See AMENDMENT, 2; EVIDENCE, 9; PLEADING, 3; VARIANCE, 1.

CONSTITUTIONAL LAW.

See BOWLS, 1; GRAND JURY; INSOLVENT DEBTORS, 1, 2; JURY.

CONTRACT.

1. A widow, who has supported a destitute infant grandchild, cannot, upon the death of the child by a railroad accident, and the payment of damages to its administrator by the proprietors of the railroad, maintain an action against the

administrator, for the amount of the child's board, even if he has expressly promised to pay it. *Shepherd v. Young*, 152.

2. A written contract to build a brick dwelling-house, "of the same depth back from the street, and of equal quality, both as to materials and finish, with F.'s house" on the adjoining lot, obliges the contractor to build a wooden shed or kitchen in the rear, if there is such an erection behind F.'s house. *Ricker v. Cutter*, 248.

See CORPORATION; EQUITY, 4; EXCHANGE; HUSBAND AND WIFE, 3, 4;
RELEASE; SALE, 1; USE AND OCCUPATION.

CONVICT.

A common seller of intoxicating liquors, sentenced to imprisonment and payment of fine and costs under *St. 1855, c. 215, § 17*, is not entitled to be discharged as a poor convict under the *Rev. Sta. c. 145, § 3*, until after three months from the expiration of the time for which he was sentenced to be imprisoned. *Gannan v. Adams*, 395.

CONVICTION.

See RECORD.

CORPORATION.

1. Upon a contract in writing, by which the subscribers "agree to pay the sums set against their respective names, to such persons as shall be authorized to receive the same, for the establishment and support of a new ferry from East Boston to Boston, the location of which shall be determined by the committee recently appointed at a meeting of the citizens; provided sufficient is subscribed for the purpose; the same to be represented by the certificates of stock to be created by the company hereafter to be organized," a corporation, established after the date of the agreement, cannot maintain an action against one who subscribes it after such organization, for the amount of his subscription, at least until a sufficient sum has been subscribed to pay for all lands, structures and boats of the ferry, free of incumbrances. *People's Ferry v. Balch*, 303.
2. Under an act of incorporation providing that the number of shares shall not exceed a certain limit, and shall be determined from time to time by the directors, no assessment can be laid until the number of shares is so determined. *Troy & Greenfield Railroad v. Newton*, 596.
3. A subscription paper for shares in a railroad corporation, which provides that assessments may be laid "when three thousand shares shall have been subscribed," does not authorize the laying of an assessment until the stipulated amount has been unconditionally subscribed, payable in cash. *Id.*
4. Thus this provision does not include a subscription, by a contractor for building a railroad, of a certain number of shares, "being a portion of" a sum which, by his contract, was to be paid to him in stock at par, or, in case of any stock being issued by the corporation below par, then at the rate of the lowest issue. *Id.*
5. So of a subscription to the stock of a railroad company, (who are authorized

by their charter to connect at the State line with any railroad that may be constructed from a place in another state, or to take a lease of any such contiguous railroad,) upon condition that no assessment shall be made until that part of the railroad between the end of the line in another state and a certain place in this commonwealth shall be put under contract. *Ib.*

6. An agreement of a railroad corporation with a subscriber for stock therein, that he "shall have the privilege of paying in at any time the whole or any part of his subscription, and shall receive interest thereon until the road goes into operation," does not bind the corporation to pay him any interest until the road goes into operation. *Waterman v. Troy & Greenfield Railroad*, 433.

See EQUITY, 7; INSOLVENT DEBTORS, 3; TAX, 2.

COSTS.

See AMENDMENT, 2; EQUITY, 10; FRAUDULENT CONVEYANCE.

COUNTY COMMISSIONERS.

See RAILROAD, 1.

COURTS.

See INSOLVENT DEBTORS, 1-3.

COVENANT.

See TENANT IN COMMON, 1.

CRIBBITING.

See HORSE.

CUSTOM.

In an action against a ferryman for the loss of a horse and wagon by his neglect to put up the chain at the end of his boat, he cannot give in evidence a custom at other ferries on the same river to put up the chain at the request of passengers, and not otherwise. *Miller v. Pendleton*, 547.

DAMAGES.

1. In an action by a woman against a railroad corporation for personal injuries occasioned to her by their locomotive engine, the death of her husband by the same cause, or the fact that she has children dependent upon her for support, is not admissible in evidence to increase the damages. *Shaw v. Boston & Worcester Railroad*, 45.
2. In an action for the breach of an agreement to convey real estate, special damages, not implied by law as the necessary consequences of the breach, cannot be recovered unless alleged in the declaration. *Warner v. Bacon*, 397.
3. Additional damages occasioned by the continued withholding of real estate, after the bringing of an action for a breach of an agreement to convey it, cannot be given in evidence in that action; but may be recovered in a subsequent action. *Ib.*

4. In an action for the nonperformance of an agreement to convey real estate, the plaintiff cannot recover expenses incurred by him in erecting a building on his other land, by reason of not obtaining a legal right to put thereon a similar building standing upon the land agreed to be conveyed. *Ib.*
5. Under an agreement for an exchange of lands, one party executed his conveyance, and the other refused then, but subsequently executed his conveyance also, which was accepted. *Held*, that such acceptance was a bar to any action by the first grantor for the rent of the land granted by him between the times of the two conveyances. *Ib.*
6. In an action to recover damages for nonperformance of an agreement to convey land, brought after a conveyance thereof has been made and accepted, evidence that the defendant was induced to make the agreement by false and fraudulent representations of the plaintiff as to the value, condition and incumbrances of land which the plaintiff on his part conveyed to the defendant, by reason of which the defendant was obliged to spend a large sum of money thereon, is inadmissible, either by way of bar, set-off or recoupment. *Ib.*

See BOND, 1; EQUITY, 3; NEW TRIAL; WRIT OF ENTRY, 2.

DECLARATION.

See PLEADING, II.

DEED.

1. Separate conveyances by trustees, not for a charity or public trust, of their separate shares in the trust property, are void. *Chapin v. Universalist Society in Chicopee*, 580.
2. A conveyance to certain persons, trustees of a voluntary association, "in trust for the stockholders of said association," *habendum* "to the said stockholders, their heirs and assigns," gives the stockholders the equitable and not the legal estate. *Ib.*

See CONDITION; EVIDENCE, 9; FRAUDULENT CONVEYANCE; MILL; MORTGAGE, 1, 5, 6; RELEASE; TENANT IN COMMON, 1.

DEMAND.

See MORTGAGE, 8; PROMISSORY NOTE, 6, 7.

DEMURRER.

See PLEADING, 6-8.

DEPOSITION.

The certificate of the clerk of a court of record, that a deposition has been opened and filed by him, is sufficient evidence that it has been duly returned, filed and opened. *Rodn v. Hapgood*, 394.

DESCENDANTS.

See WILL, 4, 5.

INDEX.

DEVISE.

See WILL.

DISCOVERY.

See INTERROGATORIES.

DISORDERLY HOUSE.

On the trial of an indictment for keeping a disorderly house, evidence of the doors being broken while the defendant occupied the house is admissible. *Commonwealth v. O'Brien*, 487.

DISTRICT ATTORNEY.

See ATTORNEY AND COUNSEL; INDICTMENT, 1.

DOMICIL.

Evidence that the selectmen of a town decided that a person taxed there was an inhabitant, and put his name upon the voting list, is not admissible for the purpose of showing that his domicile was in that town, without showing that they did it at his request. *Fisk v. Inhabitants of Chester*, 506.

See EVIDENCE, 5.

DRUNKENNESS.

1. Drunkenness in another person's room in the house in which the party resides is punishable under Rev. Sts. c. 130, § 18, without proof that the drunkenness was made public. *Commonwealth v. Miller*, 484.
2. In an indictment on Rev. Sts. c. 130, § 18, for a second drunkenness, an averment that the defendant, at a certain time, and before a certain court, "was duly and legally convicted of the crime of drunkenness, committed at" a certain time and place, is a sufficient allegation of a first conviction; and may be supported by a copy of a record of a conviction of the crime of drunkenness by the voluntary use of intoxicating liquor. *Ib.*

EASEMENT.

See EVIDENCE, 11.

EQUITY.

1. This court has jurisdiction in equity to restrain the obstruction of one mill privilege by another mill on the same stream. *Crittenden v. Field*, 621.
2. An order of a single judge of this court, sitting in equity, directing an issue of fact to be tried by a jury, is not open to exception. *Ib.*
3. An agreement for the sale of land owned in common, expressed to be executed by all the tenants in common, but in fact executed by and delivered as the deed of some of them only, may be enforced in equity against those, although it provides for the forfeiture of a certain sum as liquidated damages for any breach. *Hooker v. Pyncheon*, 550.

4. A contract made in contemplation of the marriage of the parties, respecting the property of either, to be performed after marriage, may be enforced in equity. *Miller v. Goodwin*, 542.
5. This court had jurisdiction in equity under the Rev. Sta. c. 74, §§ 8, 9, to decree specific performance by the representatives of a deceased husband, of a written agreement, made by him with his intended wife before marriage, in consideration of her past service to him and of the contemplated marriage, to convey land to her, reserving a life estate therein to himself. *Ib.*
6. A bill in equity by a grantor, to avoid a deed which he has been induced to execute by fraud of the owners of other interests in the land, cannot be sustained without averring that the grantee had notice of the fraud or paid no valuable consideration for the deed. *Root v. Bancroft*, 619.
7. Under the St. of 1851, c. 206, this court has jurisdiction in equity over the property of foreign corporations in this commonwealth. *Silloway v. Columbia Ins. Co.* 199.
8. Under the St. of 1851, c. 206, this court has jurisdiction to compel the application, in payment of a debt, of property which is not of a nature to be attached at law. *Ib.*
9. Any creditor alone may maintain a bill under the St. of 1851, c. 206, although the debtor has many other creditors, and is insolvent. *Ib.*
10. On a bill in equity under the St. of 1851, c. 206, against the agent of a foreign debtor, the defendant may retain sufficient of the property in his hands for the payment of his own services and expenses in taking care of and defending the title in the property. *Ib.*

See INSOLVENT DEBTORS, 4, 5, 8; TRUST.

ERROR.

On the reversal by writ of error of a judgment which has been satisfied by a levy and extent upon land, the court will not order restitution, but will leave the plaintiff in error to his writ of entry. *Horton v. Wilde*, 425.

See ARBITRAMENT AND AWARD.

ESTOPPEL.

A second mortgagee of personal property, by consenting to a sale thereof by the mortgagor discharged of his mortgage, does not warrant the purchaser's title, or estop himself to set up against him a title under a subsequent assignment of the first mortgage. *Clark v. Hale*, 187.

EVIDENCE.

1. The rule established by St. 1844, c. 102, that, in all prosecutions for selling spirituous liquors without license, the burden of proving a license shall be on the defendant, obliges any person prosecuted as a common seller of intoxicating liquors under St. 1855, c. 215, § 15, to prove any authority on which he relies in his defence. But it does not apply to an indictment on St. 1855, c. 405, for a nuisance by keeping a building used for the unlawful sale and unlawful keeping of intoxicating liquors. *Commonwealth v. Lohy*, 459.

2. In an action to recover the price of spirituous liquors, which is defended upon the ground that they were sold to be resold by the defendant without license, the defendant cannot, even after proving that no licenses were granted at that time in that county by the county commissioners, and that the plaintiff (who lived in an adjacent city in another county) was frequently, about that time, in the defendant's shop, and had dealings with other persons in the same city and business as the defendant, introduce evidence that it was then generally notorious there that no licenses were granted in the county, for the purpose of showing the plaintiff's knowledge of that fact. *Dunbar v. Mulry*, 163.
3. There is no presumption in favor of a meeting of a proprietary, held only twelve years since, on the warrant of a justice of the peace, on the application of five persons describing themselves as proprietors, that they were in fact proprietors. *Kilborn v. Rewee*, 415.
4. The report of an auditor is *prima facie* evidence of the facts found by him, even if he reports the evidence in detail on which his finding is based. *Leathe v. Bullard*, 545.
5. Since the *St.* of 1856, c. 188, a party to a suit, in which the issue is in which of two towns his domicile was at a particular time, may testify to the intent with which he removed from one town to the other shortly before, and returned soon after, that time. *Fisk v. Inhabitants of Chester*, 506.
6. Any person is competent to testify that certain liquor was gin. *Commonwealth v. Timothy*, 480.
7. The testimony of a witness summoned before a fire inquest held under *St.* 1854, c. 424, reduced to writing and signed by him, is admissible against him on a trial for setting the fire, without showing that he was first cautioned that he need not criminate himself. *Commonwealth v. King*, 501.
8. The admission of a party to the record is competent evidence against him, although it relates to the contents of a writing. *Loontj's v. Wadhams*, 557.
9. An additional consideration for a deed, not inconsistent with the consideration expressed therein, may be shown by parol evidence. *Miller v. Goodwin*, 542.
10. The declarations of an owner of land, not shown to be deceased, as to its boundaries, though made upon the land, are not competent evidence in favor of a person claiming under him. *Flagg v. Mason*, 556.
11. If the owner of land, while on the land, forbids the owner of adjoining land to enter thereon, and orders him off while there for the purpose of repairing an aqueduct under claim of an easement in the aqueduct by adverse possession, such verbal orders, though unaccompanied by further acts, are admissible in evidence of an interruption of the easement. *Powell v. Bagg*, 441.
12. The words "By authority" printed on the title page of a volume purporting to contain the laws of another state sufficiently show that the volume was printed by authority of the legislature of that state, to warrant its admission in evidence under the *Rev. Sts.* c. 94, § 59. *Merrifield v. Robbins*, 150.
13. In an action to recover the price of goods sold by a third person, alleged by the plaintiff to be his agent, letters and invoices of that person, and copies of letters sent to him by the defendants, (the originals of which the plaintiff has

had notice to produce,) are admissible against the plaintiff to show with whom his agent contracted. *Ib.*

14. The defendant in an action of slander, in order to rebut the inference of malice from certain statements made by him of the plaintiff's difficulties with his wife, offered to prove "that the plaintiff's wife had in fact complained of his abuse in connection with her leaving him at a certain time." *Held*, that an exception to a refusal to admit this evidence could not be sustained. *Collins v. Stephenson*, 438.
15. In an action brought by a wife, after the death of her husband, against a railroad corporation, for injuries occasioned to her by their locomotive engine, while travelling in the highway with her husband in a vehicle driven by her, his declarations, made in her absence, as to the cause and circumstances of the accident, and his previous knowledge of the disposition of the horse, and his statements showing that knowledge, are inadmissible in evidence for the defendants. *Shaw v. Boston & Worcester Railroad*, 45.
16. The books of a savings bank are admissible in evidence, in an action by a husband to recover money deposited in the bank by his wife, and at her order transferred to the credit of the defendant, to prove such deposit and transfer. *McKavlin v. Bresslin*, 177.
17. In an action by two partners for goods sold and delivered, after the introduction of their book of original entries, kept by one partner, with his supplementary oath that he made the entries, and delivered the goods to his copartner to be delivered to the defendant, the other partner may testify that he did deliver the goods to the defendant. *Harwood v. Mulry*, 250.
18. The introduction of the plaintiff's book of original entries and ledger, with his supplementary oath, in support of an action for goods sold and delivered, does not authorize the defendant to prove that the plaintiff, some years ago, made dishonest charges in other books of original entry against other parties whose accounts appeared in the same ledger. *Gardner v. Way*, 189.
19. Books of medical or veterinary practice cannot be read to the jury in argument. *Washburn v. Cuddihy*, 430.
20. On the trial of an action on a policy of insurance upon a building in which was a quantity of straw at the time of the fire, the defendants cannot, "for the purpose of showing the condition of the straw at the time," introduce evidence that three weeks previously a bonfire was made by boys outside of the building, with a trail of straw from it to the building, in which loose straw was then lying. *White v. Mutual Assurance Company*, 566.
21. In defence of an action against a gas company for injury occasioned by their neglect in repairing a leak in their pipes, evidence of their system and course of business in regard to complaints of such leaks is admissible. *Holly v. Boston Gas Light Co.* 123.

See ACTION, 2; ASSAULT; CARRIER, 3; COLLECTOR OF TAXES COMPLAINT; CONDITION, 2; CUSTOM; DAMAGES; DEPOSITION; DISORDERLY HOUSE: DOMICIL; DRUNKENNESS; EXCEPTIONS, 3-7; EXECUTION; HOUSEBREAKING; HUSBAND AND WIFE, 5; INDICTMENT, 2; INSOLVENT

DEBTORS, 7, 8, 11; INSURANCE, 1, 2, 5; INTERROGATORIES; JUDGMENT
LARCENY, 5-8, 11, 12; MORTGAGE, 4-6; PAYMENT; PROMISSORY NOTE,
2-4; RAILROAD, 1; SPIRITUOUS LIQUORS, 6; TRESPASS; VARIANCE;
WAY; WITNESS.

EXCEPTIONS.

1. At the trial of a case in the court of common pleas, the defendant objected to the plaintiff's right to recover upon the facts proved, and a nonsuit was entered; the parties agreeing, as was stated in the bill of exceptions, "that the various legal questions arising in the case should be submitted to the supreme court as upon a statement of facts." *Held*, that upon the hearing of the case in this court, no objection could be taken to the sufficiency of the answer. *Troy & Greenfield Railroad v. Newton*, 596.
 2. A judge's refusal to allow a defendant, who has pleaded *nul disseisin* and payment to a writ of entry to foreclose a mortgage, to amend at the trial by filing a disclaimer, is no ground of exception. *Richmond Iron Works v. Woodruff*, 447.
 3. For the purpose of proving that seals were duly appended to a bond, the plaintiff was permitted to ask the draftsman whether seals of the same kind were used in his office at the time of drafting this bond; and he testified that he had seen and used such seals there, but could not say whether any were there at that time. *Held*, that exceptions could not be sustained to the admission of the question. *Inhabitants of Great Barrington v. Austin*, 444.
 4. Upon the question of a waiver of a condition of a deed, an auditor admitted evidence of circumstances both before and after its delivery, although the former was particularly objected to; and reported in favor of the waiver. The court submitted his report to the jury with other evidence, and instructions that a waiver might be shown by parol evidence, and that the auditor's report was *prima facie* evidence. *Held*, that no exception could be sustained to this ruling, without showing in the bill of exceptions that specific objection was taken at the trial to the evidence of circumstances which occurred before the delivery of the deed. *Leathe v. Bullard*, 545.
 5. The admission of parol evidence corresponding with the legal interpretation of a deed is no ground of exception. *Crittenden v. Field*, 621.
 6. The submission of the construction of a written contract to the jury is no ground of exception, if they decide it aright. *Ricker v. Cutter*, 248.
 7. The question whether a verdict is against evidence cannot be raised upon a bill of exceptions. *Walker v. Penniman*, 238.
 8. The allowance of an improper and irrelevant course of argument is no ground of exception, without showing that the jury were erroneously instructed as to the weight to be given to it. *Commonwealth v. Byce*, 461.
- See AMENDMENT, 2; EQUITY, 2; INSOLVENT DEBTORS, 11; LARCENY, 9;
RAILROAD, 2.

EXCHANGE.

In an action brought here on a contract (not a bill of exchange) to pay money

in a foreign country, the plaintiff cannot recover the rate of exchange, although there are no tribunals in that country in which he could sue. *Lodge v. Spooner*, 166.

EXECUTION.

1. A levy of execution on land by appraisement, which does not state in what town the land is, and which describes the land only as bounded on a certain highway, and thence by specified courses and distances to stakes and stones, and back to the highway, is valid, if, by parol evidence of the bounds so given, the land can be identified to the satisfaction of a jury. But the testimony of the officer and appraisers as to what land is intended to be set off is inadmissible. *Chappell v. Hunt*, 427.
2. The return of an officer upon an execution levied on land, that one of the appraisers was chosen by "A. B., the attorney of the debtor," sufficiently shows that one appraiser was chosen by the debtor, within the provision of the Rev. Sta. c. 78, § 23. *Ib.*

EXECUTOR AND ADMINISTRATOR.

See AMENDMENT, 1; CONTRACT, 1; TRUST, 2, 3; WILL, 6.

FERRY.

See ACTION, 4; CORPORATION, 1; CUSTOM.

FOREIGN CORPORATION.

See EQUITY, 7-10; PROMISSORY NOTE, 1, 2.

FRAUDS, STATUTE OF.

In an action on an agreement to pay a debt contracted by another, the jury were instructed that whether the case was within the statute of frauds depended on the question whether the defendant's contract was new and original, or a mere promise to pay the existing debt of another and collateral; and that if the evidence satisfied them that, at the time of the defendant's promise to pay the amount to the plaintiff, it was also agreed that the claim against the original debtor should be cancelled and given up to him, and it was so cancelled and given up in pursuance of such agreement, "it would constitute a good consideration, not within the statute of frauds." *Held*, that the defendant had no ground of exception. *Walker v. Penniman*, 233.

FRAUDULENT CONVEYANCE.

A voluntary conveyance of land, made in good faith by a plaintiff pending a personal action, is valid as against a judgment and execution for costs, subsequently recovered therein against him. *Inhabitants of Pelham v. Aldrich*, 515.

See EQUITY, 6.

FREIGHT.

See CARRIER.

GAMING.

An action on the Rev. Sts. c. 50, § 12, to recover back money lost at gaming, cannot be maintained by the loser after the expiration of three months from the loss. *Plummer v. Gray*, 243.

GAS COMPANY.

See ACTION, 3.

GRAND JURY.

A statute, which gives a single magistrate authority to try an offence punishable by imprisonment in the state prison, without presentment by a grand jury, violates the twelfth article of the Declaration of Rights. *MERRICK, J.* dissenting. *Jones v. Robbins*, 329.

GUARANTY.

1. A guaranty that the owner of stock in a corporation shall receive dividends thereon of a specified amount for a certain number of years, he paying to the contractor all he receives above that amount, is valid. *Elliott v. Hayes*, 164.
2. A guaranty delivered by the guarantor to the guarantee, of the payment of any sales to be made to a third person, binds the guarantor, without proof of a promise of the guarantee to make such sales, or of formal notice of the acceptance of it, or of notice to the guarantor of each sale as it is made. *Paige v. Parker*, 211.
3. A notice of the amounts due under a guaranty, and of a demand upon the principal and his refusal to pay, at any time before suing on the guaranty, is sufficient, if it does not appear that the defendant had suffered any loss by the delay. *Ib.*

GUARDIAN AND WARD.

See HOMESTEAD; TRUST, 3.

HIGHWAY.

See WAY.

HOMESTEAD.

The St. of 1855, c. 238, exempting a homestead from levy on execution, and from conveyance by the owner, unless his wife joined in the deed, did not prevent the estate from being sold by license of the probate court upon the husband's becoming a spendthrift. *Wilbur v. Hickey*, 432.

HORSE.

Cribbiting, affecting the health and condition of a horse, so as to render him less able to perform service and of less value, is unsoundness. *Washburn v. Cuddehly*, 430.

HOUSEBREAKING.

1. An indictment on *St.* 1853, c. 194, against two, for having in "their possession," on a certain day, certain tools and implements, designed and adapted for breaking open buildings, sufficiently charges a joint possession; and is supported by proof of the commission of the offence on any day before the finding of the indictment. *Commonwealth v. Tivon*, 375.
2. An indictment on *St.* 1853, c. 194, which alleges an intent to use the implements for the purpose of breaking open houses and shops, in order to steal from the owner thereof money and goods, need not describe the buildings intended to be broken open, nor the property intended to be stolen, nor name the owner of either. *Ib.*
3. An indictment on *St.* 1853, c. 194, is supported by proof that some of the implements described in the indictment were in the possession of the defendant, and adapted and designed for the unlawful purpose specified. *Ib.*
4. It is not necessary, to support an indictment on *St.* 1853, c. 194, that the tools or implements should have been originally made or intended for an unlawful use. *Ib.*
5. On the trial of an indictment against two, on *St.* 1853, c. 194, after proof of a common design or enterprise of the defendants, the declarations of one in relation to the joint enterprise are admissible in evidence against both. *Ib.*
6. An indictment on *St.* 1853, c. 194, is maintained by proof of possession, either actual or constructive, with the guilty intent. But proof of possession of implements by one defendant, both intending to use them in a joint undertaking, is not sufficient. *Ib.*

HUSBAND AND WIFE.

1. Money paid by a married woman before the *St.* of 1855, c. 304, upon a bond to convey land to her, is *prima facie* her husband's property, and may be recovered back by him, on offering to surrender the bond. *Casey v. Wiggin*, 231.
2. Before the *St.* of 1855, c. 304, the earnings of the personal labor of a wife, even when living apart from her husband, were his property, and might be recovered by him from one to whom she had assigned them without value. *McKavlin v. Bresslin*, 177.
3. A husband, whose wife has left his house with his express or implied consent, or in consequence of his cruelty and neglect, is bound to pay for necessaries furnished to her while so absent, until he goes or sends for her to return. *Mayhew v. Thayer*, 172.
4. A person who, at the request of a wife who has justly left her husband's house, employs and pays a physician for necessary medical attendance upon her, may recover from the husband the amount so paid. *Ib.*
5. In an action against a husband for necessaries furnished to his wife while lawfully absent from his house, evidence of harsh language used to the wife's son in her presence by the defendant is admissible for the purpose of showing harsh and cruel treatment of the wife by him. *Ib.*

See EQUITY, 4, 5; EVIDENCE, 14-16.

IMPLEMENTS OF HOUSEBREAKING.

See HOUSEBREAKING.

INDICTMENT.

1. A district attorney's signature to an indictment need not show for what district he is attorney. *Commonwealth v. Beaman*, 497.
 2. An indictment for an assault in one town is supported by proof of an assault in another town in the same county and within the jurisdiction of the court. *Commonwealth v. Tollicer*, 386. *Commonwealth v. Creed*, 387.
- See ASSAULT; BOWLS, 2; DRUNKENNESS, 2; HOUSEBREAKING; JUDGMENT, 2; LARCENY, 2-4, 11, 12; RAPE; SPIRITUOUS LIQUORS, 4, 5.

INSOLVENT CORPORATION.

See INSOLVENT DEBTORS, 3.

INSOLVENT DEBTORS.

1. The St. of 1856, c. 284, §§ 1, 2, 41, transferring all the jurisdiction of commissioners of insolvency to "courts of record, to be called courts of insolvency," with judges to be appointed by the governor and council, and to hold during good behavior, does not violate the nineteenth article of amendments of the Constitution of Massachusetts, which directs that "the legislature shall prescribe, by general law, for the election of commissioners of insolvency by the people of the several counties, for such term of office as the legislature shall prescribe." *Dearborn v. Ames*, 1. *Opinion of Justices*, 20.
2. By the St. of 1856, c. 284, § 1, judges of insolvency are to be appointed by the governor and council, like other judicial officers. *Dearborn v. Ames*, 1.
3. The St. of 1856, c. 284, entitled "an act in addition to the several acts for the relief of insolvent debtors, and the more equal distribution of their effects," and transferring to the courts of insolvency thereby established all the jurisdiction of commissioners of insolvency "under and by virtue of the acts to which this is in addition," transfers the jurisdiction over insolvent corporations under the St. of 1851, c. 327, as well as that over insolvent debtors under the St. of 1838, c. 163, and the acts in addition thereto. *Ib.*
4. A creditor of an insolvent debtor, who attaches his property after the commencement of proceedings in insolvency and before the assignment, has sufficient interest to maintain a bill in equity to set aside the proceedings. But if the attachment is not made until after the assignment, *quære*. *Merriam v. Sewall*, 316.
5. The want of an authorized signature to the petition of a creditor under the insolvent laws is ground for setting aside the proceedings. *Ib.*
6. *It seems*, that a commissioner of insolvency has power to allow a creditor's petition to be amended so as to set forth more precisely and fully the debt originally relied on. *Ib.*
7. The facts stated in a creditor's petition under the insolvent laws must be proved by legal and competent evidence; and *it seems*, that taking the testi-

- mony of a material witness without oath or affirmation, is ground for setting aside the proceedings. *Ib.*
8. A decree of this court in equity, affirming the validity of proceedings in insolvency, upon a petition of the debtor to set them aside, is conclusive against any subsequent application by a creditor to set aside the proceedings on the same and other grounds; even if this creditor had no notice of the first petition to this court. *Ib.*
9. An adjournment of the second meeting of the creditors of an insolvent debtor "to the time and place of holding the third meeting" is illegal; and a certificate of discharge granted at such adjourned meeting is invalid. *Greenough v. Whittemore*, 193.
10. A certificate of discharge, obtained upon second proceedings in insolvency, is no bar to an action upon a debt which might have been proved under the first proceedings, and was not proved under the second proceedings; unless it was discharged by the first proceedings, and renewed by a subsequent promise. *Gardner v. Way*, 189.
11. In an action on a debt from which the debtor has received a certificate of discharge in insolvency, evidence of promises made before the commencement of the proceedings, to pay the debt notwithstanding, are inadmissible; and their admission is ground of exception, although accompanied by evidence of a subsequent promise, and "only for the purpose of showing that the defendant would be likely to make the promise after he went into insolvency, and as showing that he considered it an honorary debt," and although the jury are instructed that "to entitle the plaintiff to recover, they must be satisfied that the defendant, after the commencement of the insolvency proceedings, unconditionally promised the plaintiff to pay his debt." *Reed v. Frederick*, 230.
12. The rent of a boarding house kept by a single woman without a family is not a claim for necessities against her, within the *St.* of 1848, c. 304, § 10, which provides that such claims shall not be barred by a discharge in insolvency. *Prentice v. Richards*, 226.
13. Debts purchased with knowledge of the debtor's insolvency, and reason to believe that he is about to go or be driven into insolvency, and notice to the debtor of the purchase, cannot be set off in an action by the assignee in insolvency upon a debt due from the purchaser to the debtor. *Smith v. Hill*, 572.

See PAYMENT.

INSURANCE.

I. Fire Insurance.

1. A policy of insurance on a "dwelling-house and wood-house," described in the application as "occupied for the usual purposes," covers a building, built at one time, with a single frame and roof, and designed for one building, for a carriage-house and wood-house, of which the wood room constitutes two thirds and is separated from the carriage room by a loose partition extending to the eaves on one side, and half way to the roof on the other; and does not exclude evidence that the whole building was called by the tenants and neighbors the "wood-house." *White v. Mutual Fire Assurance Co.* 566.

- 2 A hog-pen and hen-house, from three and a half to six feet high, covered with boards, with a partition of boards between them, are not a building, within the meaning of an application for insurance which represents that there are no buildings not disclosed within a certain distance; and evidence that they increased the risk is inadmissible. *Ib.*

The insurance of a landlord who uses 'reasonable care and diligence in the selection of tenants and the management of the premises is not affected by his tenants keeping straw on the premises, without his knowledge or assent, so as to increase the risk. *Ib.*

A mortgagee of real estate, to whom a policy of insurance thereon is made payable in case of loss, is not the assignee of the policy, and is affected by subsequent acts of the assured. *Loring v. Manufacturers' Ins. Co.* 28.

A policy of insurance, made to the owner of a mill, upon "his interest, being one half" thereof, provided that if the property should be sold or conveyed, in whole or in part, the policy should become void, but that the policy "might continue for the benefit of such purchaser, if the company give their assent thereto, to be evidenced by a certificate of the fact, or by indorsement on this policy." The assured afterwards obtained another policy from the same company on "his interest, being three tenths" of the same mill; and then sold the whole property, and assigned the second policy to the purchaser, by an instrument thereon, which recited that he had "sold the within insured property" to him, and was assented to in writing by the company. *Held*, that this assent was not a sufficient certificate of the fact of sale, to continue the first policy in force; and that oral evidence that the sale of the whole property was disclosed to the company before their assent to the indorsement upon the second policy, was inadmissible. *Ib.*

1. An application to a mutual fire insurance company for insurance on buildings contained the following question and answer: "State whether or not incumbered, to whom, and to what amount:" "Mortgaged for \$2,000 on the buildings, land, &c. — value \$7,000;" and concluded with an agreement of the applicant "that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant, and are material to the risk; and in case of insurance he holds himself bound by the act of incorporation and by-laws of the company." The policy was also made subject to the provisions and conditions of the by-laws; and one of the by-laws provided that the policy should be void, unless the true title of the assured should be expressed in the application. The policy also expressed the intention of the company to rely on their lien on the interest of the assured in the buildings and the land under the same. At the time of the application, the land on which these buildings stood, and a larger piece of land, owned by the same person, but separated by a court laid out between them by the owner, were both subject to a mortgage for \$2,000 to J. S., and to another mortgage for \$800 to another party. The assured afterwards indorsed upon the policy an assignment reciting his "having mortgaged the property within mentioned to J. S." and assigning the policy to him as collateral security; and the com-

pany assented in writing to this assignment. *Held*, that the failure to disclose the mortgage for \$800, in the original application, avoided the policy in the hands of the assignee. *Bowditch Mutual Fire Ins. Co. v. Winslow*, 38.

7. Upon the face of a policy were printed provisions that in case the assured already had other insurance on the property, not notified to the company and mentioned in the policy, this policy should be void; and that if subsequent insurance should be obtained, and not notified to the company and indorsed upon the policy, the policy should cease. *Held*, that a clause inserted in writing upon the face of the policy, in these words, "other insurances permitted without notice until required," applied to prior as well as to subsequent insurances and that a previous policy did not therefore avoid this one; but, if it contained similar printed clauses, was itself made void by the obtaining of this one, without any vote or adjudication by the previous insurers that the property was over insured and an election by them to cancel their policy; although they by their policy reserved the right to cancel it in case of any subsequent insurance which, with theirs, should in their opinion amount to an over insurance. *Kimball v. Howard Fire Ins. Co.* 33.
8. A notice by the assured to the agent of an insurance company, of the assured's intention to procure subsequent insurance upon the same property, is not evidence of a compliance with a provision in the first policy requiring any subsequent insurance to be made known to the first insurers and indorsed upon the policy or otherwise acknowledged in writing by them. *Ib.*
9. The question whether reasonable diligence has been used in communicating a subsequent insurance to the first insurers, when all the facts are agreed, is a question of law for the court. *Ib.*
10. Seven months is an unreasonable delay in giving notice of a subsequent insurance to previous insurers whose policy expressly required the assured to give such notice "with reasonable diligence." *Ib.*
11. A policy of insurance against fire, issued by a stock company in consideration of an entire premium, for one sum upon a stock of goods, and for an additional sum upon the fixtures in the same shop, and stipulating that in case of any subsequent insurance "on the same property," without a certain notice and acknowledgment, "this policy shall cease, and be of no further effect," is wholly avoided by such a subsequent insurance on the goods only. *Ib.*

See PROMISSORY NOTE, 1, 2.

II. Marine Insurance.

12. The insertion of the words "not liable for any repairs made in California," in a policy of insurance on a vessel, which contains the usual printed clause that "the insured shall not have the right to abandon the vessel for the amount of damage merely, unless the amount which the insurers would be liable to pay, under an adjustment as of a partial loss, shall exceed half the amount insured," does not prevent the assured from making an abandonment and claiming a constructive total loss, if the vessel is stranded in San Francisco, and cannot be thoroughly repaired there at a cost of less than three fourths of her value, if the expense of such temporary repairs there as will make her sea-

- worthy to be navigated to New York, (the nearest port at which full repairs can be made,) with the expenses of such navigation and of such full repairs there, would exceed three fourths of her value. *Lincoln v. Hope Ins. Co.* 22.
13. In computing a constructive total loss, the cost to be estimated is what it will cost to completely and thoroughly repair the vessel, not merely what will make her seaworthy, capable of keeping the sea with cargo. *Ib.*
 14. An abandonment which states that the vessel has been stranded at San Francisco, and is so much injured as to render it necessary to place her on shore, and that she cannot be repaired there, is sufficient to authorize the assured to recover a constructive total loss upon the ground of the amount of damage and the cost of repairs at the nearest port at which repairs can be made. *Ib.*
 15. In computing a constructive total loss, the cost of taking a vessel from the place where she is stranded to the nearest port at which she can be completely repaired is to be taken into consideration. *Ib.*

INTEREST.

See CORPORATION, 6.

INTERROGATORIES.

1. A plaintiff cannot be nonsuited under *St.* 1852, c. 312, §§ 61-72, for insufficiency of answers, which substantially meet all the interrogatories of the adverse party, unless he has refused to comply with an order of the court pointing out the insufficiencies, and directing further answers. *Amherst & Belchertown Railroad v. Watson*, 529.
2. A party to an action may make one answer to several interrogatories of the adverse party, to each of which it is responsive, notwithstanding the provision of *St.* 1852, c. 312, § 67, that "each interrogatory shall be answered separately and fully." *Ib.*
3. One party cannot, as of right, and without a specific order of court, require the other to produce all his books and papers in answer to interrogatories under *St.* 1852, c. 312, §§ 61-72. *Ib.*

INTOXICATING LIQUORS.

See SPIRITUOUS AND INTOXICATING LIQUORS.

JUDGE.

See INSOLVENT DEBTORS, 1-3.

JUDGMENT.

1. Judgment for the tenant in a writ of entry is conclusive evidence of the title in a subsequent action of trespass by the demandant against the tenant for breaking and entering the same close, but is no bar to such an action. *Stevens v. Taft*, 419.
2. Upon a complaint made to a justice of the peace for an offence of which he had concurrent jurisdiction with the court of common pleas, the justice's record

stated the complaint and warrant, the defendant's appearance and plea of not guilty, and that, after hearing witnesses, and fully understanding the defence, it was considered by the court that he was guilty of the offence so charged against him, and that he should therefore recognize for his appearance before the next court of common pleas. *Held*, that this was no bar to an indictment for the same offence. *Commonwealth v. Harris*, 470.

See INSOLVENT DEBTORS, 8.

JURISDICTION.

1. A court whose jurisdiction is limited to "cases wherein the debt or damages demanded do not exceed" a certain sum, has jurisdiction of a case in which the *ad damnum* is within that sum, although a larger sum is claimed in the declaration. *Hapgood v. Doherty*, 373.
2. The mere grant of "exclusive jurisdiction" to a police court by the statutes of the Commonwealth, over certain offences, does not exclude the authority of justices of the peace to receive complaints and issue warrants returnable before that court against persons charged with those offences. *Commonwealth v. O'Connell*, 464.
3. Under the statutes of the Commonwealth, a justice of the peace may bind over for trial in the court of common pleas a defendant charged with an offence of which he has jurisdiction concurrent with that court. *Commonwealth v. Harris*, 470.

See JURY; PLEADING, 5.

JURY.

1. A statute, which authorizes a single magistrate to try and pass sentence in a criminal case, but gives the defendant an unqualified and unfettered right of appeal, and a trial by jury in the appellate court, subject only to the requirement of giving bail for his appearance there, or, in default of such bail, being committed to jail, is not unconstitutional as impairing the right of trial by jury. THOMAS, J. dissenting. *Jones v. Robbins*, 329.
2. A statute extending the jurisdiction of justices of the peace to civil actions for the recovery of not more than one hundred dollars, and requiring any party appealing to give security for the prosecution of his appeal, and for costs, is not unconstitutional as infringing on trial by jury. *Hapgood v. Doherty*, 373.

See GRAND JURY.

JUSTICE OF THE PEACE.

See JURISDICTION; RECORD.

LANDLORD AND TENANT.

The assignment, without the approbation of the lessor, of a lease which contains a covenant that the lessee will not lease, underlet nor permit any other person to occupy without such approbation, does not determine the lease, without reëntry by the lessor; nor enable the lessor to maintain an action for use and

occupation against one occupying part of the premises under the assignee before such reëntry. *Shattuck v. Lovejoy*, 204.

See CONDITION, 1 ; INSURANCE, 3 ; PRINCIPAL AND AGENT, 2.

LARCENY.

1. A statute, conferring on police courts concurrent jurisdiction with the court of common pleas and the municipal court of Boston "of all larcenies where money or other property stolen shall not be alleged to exceed the value of fifty dollars, in all which cases the punishment imposed may be such as the court of common pleas and the municipal court are authorized to inflict by existing laws," includes aggravated as well as simple larcenies. *Jones v. Robbins*, 329.
2. The St. of 1852, c. 4, conferring on justices of the peace jurisdiction of larceny of property in a building, where the amount stolen is small, has not made it necessary, on the trial of an indictment in the court of common pleas, to prove that the property stolen exceeded that value. *Commonwealth v. Byce*, 461.
3. An indictment for stealing in a "refreshment saloon" does not show that the larceny was in a building, and the defendant, upon conviction, can only be sentenced for a simple larceny. *Commonwealth v. Maber*, 469.
4. An indictment for stealing bank bills, which states the amount and value of the whole, need not describe their number or denomination. *Commonwealth v. Stebbins*, 492.
5. The testimony of a single witness, that he received certain bank bills in a neighboring state, and that they were bills of banks there, is sufficient evidence to be submitted to a jury of those bills being of value and current in this commonwealth. *Ib.*
6. A defendant may be convicted, under the Rev. Sts. c. 126, § 17, of stealing bank bills, without proof of their form or tenor. *Ib.*
7. Taking money with intent to appropriate it to the payment of a debt due to the taker from the party from whom it is taken is sufficient evidence of a conversion to the taker's own use, to constitute larceny. *Ib.*
8. Evidence that one charged with larceny was reputed at the time to be a person of property is inadmissible in his defence. *Ib.*
9. Upon the trial of an indictment for larceny, the defendant's taking of the property was proved ; and the jury were instructed that he was not guilty if they were satisfied that he took the property under an honest belief that he had a legal right to take it in the way and under the circumstances that he did take it, although in fact he might have had no such legal right. *Held*, that this gave him no ground of exception. *Ib.*
10. Peafowls are subjects of larceny. *Commonwealth v. Beaman*, 497.
11. An indictment for stealing any animal, which does not state whether it is alive or dead, is not supported by evidence that it was dead when stolen ; even if it is an animal which has the same appellation whether dead or alive. *Ib.*
12. Thus an indictment for stealing "one peahen" and "one turkey" in this

commonwealth, is not supported by evidence of taking them alive in another state, and bringing them dead into this state. *Id.*

See VERDICT.

LEGACY.

See WILL, 7.

LICENSE.

See EVIDENCE, 1, 2.

LIEN.

See CARRIER, 1.

LIMITATIONS, STATUTE OF.

See GAMING; MORTGAGE, 3.

LORD'S DAY.

A complaint on the Rev. Sta. c. 50, § 1, for keeping open a shop on the Lord's day, for the purpose of doing business therein, is supported by evidence that the owner, his servant or agent, permitted the door to remain unlatched so as to admit persons for the purpose of doing business therein. *Commonwealth v Lynch*, 384.

See USE AND OCCUPATION.

MEDICAL BOOKS.

See EVIDENCE, 19.

MESNE PROFITS.

See WRIT OF ENTRY, 2.

MILL.

1. A conveyance of one of two ancient mills, which comprise the entire mill privilege of a stream, carries with it such a proportion of the whole right in the stream as the water used to drive the mill conveyed bears to that used by the other mill. *Crittenden v. Field*, 621.
2. Under a grant of a mill privilege, "commencing at a certain permanent rock on which the upper dam belonging to the grist mill now stands, thence running on said brook to the dam occupied for supplying water to the grist mill, with the privilege of erecting buildings on the adjacent land to the grantor belonging, for any purpose except for a grist mill and saw mill, for the occupation and use of any other machinery carried by water power, reserving therefrom the right of taking water from the said upper dam to the grantor, also reserving to the grantor the land on said brook one hundred feet below said permanent rock," the grantee has no right to raise the water above the permanent rock, or erect a dam within one hundred feet of the upper dam. *Id.*

3. Deeds of land bounding on a stream do not affect previous independent conveyances of all the water power therein. *Ib.*

See EQUITY, 1.

MORTGAGE.

I. Of Real Estate.

1. A conveyance of land in fee, taking back a bond to reconvey upon repayment of the consideration money, and to permit the obligee meanwhile to occupy, paying rent equal to interest on that sum, is a mortgage. *Woodward v. Pickett*, 617.
2. A mortgagee who is not in actual possession, and has not entered for foreclosure, cannot maintain trespass against a railroad corporation owning the equity of redemption for cutting grass on land within the location of their railroad. *Ib.*
3. Where a mortgage of real estate is assigned as collateral security for a debt other than the mortgage debt, and foreclosed by the assignee, by whom the land is afterwards sold, the debt to secure which the assignment is made is not paid by the foreclosure, but only by the actual sale and conversion into money; and where the debt so secured is that of another person, the right of action of the mortgagee against him as for money paid to his use is not barred by the statute of limitations until the expiration of six years after such sale and conversion. *Brown v. Tyler*, 135.
4. An unrecorded certificate of an entry to foreclose a mortgage, made before the Rev. Sts., in the presence of two witnesses, is competent evidence of the foreclosure, if supported by the testimony of the witnesses that after the entry certain papers were executed by the parties, and that their names upon the certificate are in their handwriting, and must have been written by them, although they have no recollection what the papers were, or that they signed any papers. *Crittenden v. Rogers*, 452.
5. A quitclaim deed to one of two mortgagors, from a mortgagee who has foreclosed his mortgage, in consideration of the payment of a sum equal to the original mortgage debt, is not sufficient evidence of an opening of the foreclosure to revest the title in the mortgagors. *Ib.*
6. An indenture between the grantee of a right to redeem land from a mortgage, the mortgagee, who has entered for foreclosure, and a third person claiming title to the land, by which the mortgagee releases to the other parties his right of foreclosure, and agrees to collect the rents and divide them among all the parties in proportion to their claims against the original mortgagor, and in which provision is made for a future sale of the estate and a like division of the proceeds, implies a release of the equity of redemption. *Tenney v. Blanchard*, 579.

See APPEAL; INSURANCE, 4, 6; PAYMENT; WRIT OF ENTRY, 3, 4.

II. Of Personal Property.

7. A. sold an engine lathe to B., taking back a mortgage thereof which contained a covenant for possession by the mortgagor until breach of condition, and de-

livered the machine to a carrier, to be taken to the town of B.'s residence; B. on the same day pledged the machine for a valuable consideration to C., and promised to have it sent to him on its arrival; the next morning C. went to the carrier, and directed a teamster to take it home, which he did on the same day; after this order, but before the delivery, A. recorded his mortgage; C. afterwards sold and delivered the machine to another person, and, on A.'s demanding it, answered that he had sold it, and did not know where it was, and refused to assist A. in finding it. *Held*, that there was sufficient evidence of title in A. and conversion by C. to support an action of trover. *Chamberlain v. Clemence*, 389.

3. A demand, under the Rev. Sta. c. 90, § 79, on an officer attaching chattels mortgaged, which describes a mortgage of a certain date, made to secure the sum of \$300 with interest from said date, and gives notice that the plaintiff claims "said sum of \$307.90," as due him on said mortgage, is sufficient. *Gas-sell v. Sanborn*, 218.

See ESTOPPEL.

NEGLIGENCE.

See ACTION, 3, 4; INSURANCE, 9, 10; RAILROAD.

NEW TRIAL.

In an action for damages against a railroad corporation by a woman who, by being struck by their locomotive engine, had lost one arm and the use of the other, and been otherwise much bruised and injured, so as greatly to impair her health and memory, the plaintiff at different trials obtained three verdicts, of \$15,000, \$18,000 and \$22,250, respectively, the two first of which were set aside for error in the instructions of the judge. The court refused to set aside the third on the ground that the damages were excessive. *Shaw v. Boston & Worcester Railroad*, 45.

NONSUIT.

See INTERROGATORIES, 1.

NOTICE.

See GUARANTY, 2, 3; PAUPER, 2, 4.

NUISANCE.

See EVIDENCE, 1; PRINCIPAL AND AGENT, 2.

OFFICER.

See ACTION, 2; ATTACHMENT.

PARDON.

See RELEASE.

PARENT AND CHILD.

See ACTION, 3.

PARISHES AND RELIGIOUS SOCIETIES.

1. The vote of a religious society, assembled at its annual meeting for the election of officers, that the officers shall be always chosen by ballot, does not invalidate an election of officers by hand vote at a subsequent annual meeting. *Wardens of Christ Church v. Pope*, 140.
2. The election, by hand vote, of officers of a religious society, in which each proprietor has a vote for every pew which he owns, cannot be objected to, upon the ground of the inherent difficulty of thus ascertaining the result, after the election has taken place and the result has been declared. *Ib.*
3. A vote of a Protestant Episcopal Church to increase the number of vestrymen does not affect the rights and powers of the former vestrymen, until the additional members have been chosen. *Ib.*
4. A warrant of the vestry of a Protestant Episcopal Church, calling a meeting of the proprietors to elect officers, may be signed by the chairman and clerk only. *Ib.*
5. The vestry of a Protestant Episcopal Church have authority to call meetings of the proprietors. *Ib.*
6. The vestry of a Protestant Episcopal Church may transact business in the absence of both wardens, if a majority of all their members is present; even if it has been voted at several annual meetings, "that one warden and four vestrymen constitute a quorum for transacting business. *Ib.*
7. The reception of illegal votes at the election of officers of a religious society does not invalidate the election, if it does not affect the result. *Ib.*

PARTIES TO ACTIONS.

See EVIDENCE, 5; INTERROGATORIES; PLEADING, 1.

PAUPER.

1. No action lies by the Commonwealth against the town of a pauper's settlement for the expenses of his support at one of the state almshouses before the St. of 1855, c. 445, took effect. *Commonwealth v. Inhabitants of Dracut*, 455.
2. The Commonwealth cannot recover of a town, under St. 1855, c. 445, § 4, the expenses of supporting a pauper at a state almshouse more than three months next before notice thereof to the town. *Ib.*
3. The St. of 1855, c. 445, giving a remedy to the Commonwealth against towns for the support of "any pauper who shall become an inmate of the state almshouses," includes the support, since that statute took effect, of paupers who became inmates of one of the state almshouses before. *Ib.*
4. All objections to the sufficiency of a notice to charge a town with the support of a pauper are waived by returning an answer denying all liability on the ground that the pauper has no settlement in the town. *Ib.*

PAYMENT.

In a suit to foreclose a mortgage, which the defendant alleged had been paid, the plaintiff proved an agreement to change the appropriation of the payments, previously agreed to be applied on the mortgage debt, to another debt. *Held*, that the defendant might then prove that the agreement to change the appropriation was made after he had applied for the benefit of the insolvent laws, and therefore invalid. *Richmond Iron Works v. Woodruff*, 447.

See MORTGAGE, 8; PROMISSORY NOTE, 4.

PERPETUITY.

See WILL, 2.

PLEADING.

I. *Parties to Actions.*

1. The shipper named in a bill of lading may sue the carrier for an injury to the goods, although he has no property, general or special, therein. *Blanchard v. Page*, 281.

II. *Declaration.*

2. In an action for the price of intoxicating liquors the declaration need not state that the sale was authorized by law. *Maher v. Dougherty*, 437.
3. A declaration on a promissory note against one who had no share in the consideration for which it was given, and signed as surety some time after its execution and delivery by the maker, must aver the consideration of the defendant's signing. *Stone v. White*, 589.
4. In an action of tort against an officer for taking on attachment against a third person chattels mortgaged to the plaintiff, the declaration need not allege that the demand made by the plaintiff on the officer, as required by the Rev. Sta. c. 90, § 79, contained a just and true account of the mortgage debt. *Gassett v. Sanborn*, 218.

See AMENDMENT; JURISDICTION, 1; VARIANCE.

III. *Demurrer and Answer.*

5. After a general appearance and answer filed in behalf of two defendants, and one trial had without objection to any defect of service or jurisdiction, a defendant who has personally attended at a second trial cannot object that the court, in fact and by the record, has not acquired jurisdiction of his person. *Loomis v. Wadhams*, 557.
6. Under the St. of 1852, c. 312, the objection, that a declaration in slander, which sets forth a general charge in itself imputing a felony, and states the words spoken, is insufficient, by reason of not stating the circumstances necessary to show the sense in which the words were spoken, must be taken by demurrer. *Clay v. Brigham*, 161.
7. Misjoinder of causes of action in the same count can be raised by demurrer only. *Commonwealth v. Inhabitants of Dracut*, 455.

8. The omission of an allegation of notice can be taken advantage of by demurrer only. *Id.*

See EXCEPTIONS, 1; WRIT OF ENTRY, 4.

PLEDGE.

See SALE, 5.

POLICE COURT.

See JURISDICTION; LARCENY, 1.

POOR DEBTORS.

1. In a notice to the judgment creditor of the intention of a debtor, committed on execution, to take the poor debtors' oath, a description of the execution as issued from the court of common pleas holden at Lowell in the county of Middlesex, when in fact it was issued from that court holden at Boston in the county of Suffolk, is such a variance as avoids the discharge of the debtor, and makes liable the sureties upon his bond for the prison limits, if he goes beyond those limits. *Shed v. Tileston*, 244.
2. The condition of a bond for the liberty of the prison limits is satisfied by the debtor's being admitted to take the poor debtors' oath on the ninety-first day from the date of the bond, without any surrender to the jailer either on or before that day. *Penniman v. Odiorne*, 246.

PRINCIPAL AND AGENT.

1. The owners of a vessel are not liable for damages occasioned by the negligence of stevedores employed for a gross sum by the consignees of the charterers in unloading the cargo. *Linton v. Smith*, 147.
2. A steam engine erected in a building situated on State Street in Boston, under a license from the board of aldermen, and with the safety plug required by law, is not a nuisance; and the owner of the building is not liable to third persons for any injury resulting to them from its maintenance or use by his tenant. *Saltonstall v. Banker*, 195.

See EVIDENCE, 13; PLEADING, 1.

PRINCIPAL AND SURETY.

See PLEADING, 3; PROMISSORY NOTE, 8.

PROMISSORY NOTE.

1. A promissory note given by a resident of this state for a premium on a policy of insurance made to him here by a foreign insurance company, who have not complied with the Rev. Sta. c. 37, and St. 1847, c. 278, § 2, is void in the hands of the company; although he is a mere agent for a citizen of another state, who is the owner of the property insured, and the policy is expressed to be "for whom it may concern." *Williams v. Cheney*, 206.

2. An indorsee for value of a premium note given to a foreign insurance company, who have not complied with the laws of this state, cannot recover thereon, if he knew or had reasonable cause to know, when he took the note, that the company had not complied with such laws; and the fact that he was a director, treasurer and one of the executive committee of the company is sufficient evidence that he had reasonable cause of such knowledge. *Ib.*
3. A promissory note, indorsed in blank, was accidentally left, by the owner, in a broker's office, and the broker, without himself indorsing it, deposited it in a bank to whom he was indebted for money lent, payable on demand, and to whom he was accustomed to give, as collateral security for such loans, his own memorandum checks, payable on demand, or indorsed notes. *Held*, that the bank could not hold the note as against the rightful owner, without showing that they took it in the usual course of business, or as security for a specific debt. *Merriam v. Granite Bank*, 254.
4. In a suit against the maker of a promissory note by one who took it overdue, as collateral security for a smaller debt, evidence that the plaintiff's assignor, while holding the note, received money towards its payment, the amount of which is not exactly proved, and, after assigning the note to the plaintiff, declared that it was paid, is competent to prevent a recovery of a greater amount than the plaintiff's own debt; and any payments specifically proved to have been made to such assignor, while he held the note, are admissible in further reduction of the amount to be recovered. *Bond v. Fitzpatrick*, 536.
5. *It seems*, that after the indorser of an overdue promissory note, with the means of knowing what demand has been made on the maker, has paid the note, no action can be maintained by the holder against a notary for negligence in making a demand on the maker; although at the time of such payment the holder authorized the indorser to bring such a suit in the holder's name against the maker. *Warren Bank v. Parker*, 221.
6. A bank in Boston, with whom a promissory note was placed for collection, gave notice to the maker before the note fell due, according to the usage in Boston, of the day when the note would be payable, and requested him to come and pay it; and the note remained in the bank through banking hours of that day. *Held*, that if the maker was a trader, and accustomed to transact business at the bank, his consent to the general usage which made such notice sufficient might be shown, and, if shown, rendered any other demand immaterial. *Ib.*
7. A demand of payment of a note payable at a particular bank, made at that bank after the close of business hours, to which the officers of the bank answer that the maker has no funds there, is sufficient to charge an indorser. *Shepherd v. Chamberlain*, 225.
8. The signing by a third party as surety of a note payable on demand, some months after its execution by the original promisor and delivery to the payee, and for a new consideration, is a new and independent contract, not requiring the consent of the original promisor. *Stone v. White*, 589.

See PLEADING, 3.

PROPRIETARY.

See EVIDENCE, 3.

RAILROAD.

1. In an action against a railroad corporation for injuries occasioned by their locomotive engine to a traveller in the highway at a place where the county commissioners had authorized the corporation, upon certain conditions, to cross upon a level, the record of the county commissioners stating that in their opinion no flagman at the crossing was necessary, is not competent evidence of due care on the part of the corporation. *Shaw v. Boston & Worcester Railroad*, 45.
2. In an action against a railroad corporation for injuries sustained by collision with their locomotive engine at a railroad crossing, the plaintiff contended that the defendants had been guilty of negligence in omitting to have a flagman there to give notice of the approach of the train; and the jury were instructed, "that it was the duty of the plaintiff to satisfy the jury that this was a necessary, reasonable and proper precaution, in the exercise of ordinary care on their part, at the place, time and under the circumstances proved at the time of the accident; and that, although the defendants had complied with all the requirements of the statutes, this would not exempt them from liability, if they had omitted other precautions, which in the exercise of due and ordinary care they were bound to take at the time, place and under the circumstances of the accident, the omission of which proper precautions was the efficient cause of the damage and injury to the plaintiff." *Held*, that the omission of the judge to distinguish between circumstances which could be reasonably anticipated, and those in their nature extraordinary, but which would make unusual precautions proper, if they could have been foreseen, entitled the defendants to a new trial. *Id.*
3. The degree and measure of care due from a railroad corporation and from a traveller in the highway, at a railroad crossing, are precisely the same: being those which men of ordinary sense, prudence and capacity would take under like circumstances in the conduct and management of their respective vehicles. *Id.*
4. In an action by a traveller in the highway against a railroad corporation, for injuries sustained by collision with their locomotive engine at a railroad crossing, the presiding judge instructed the jury, "that the plaintiff was bound to use ordinary care in the conduct and management of his vehicle in the highway, and in the approach to and passage of the crossing; and the defendants were bound to use reasonable care in the conduct and management of their engines and trains, the manner and extent of which would be such care in the management of their engines and trains as would be sufficient to enable a traveller upon the highway, who used ordinary care, there to pass over and by the crossing in safety." *Held*, that these instructions were objectionable, as implying that proof of due care on the part of the plaintiff would of itself show that the defendants were in fault. *Id.*

See ACTION, 1; BOND, 2, 3; CORPORATION, 4-6; DAMAGES, 1; MORTGAGE, 2; NEW TRIAL; VARIANCE, 12.

RAPE.

1. An indictment for rape sufficiently states that it was by force, by alleging that the defendant "violently and against her will feloniously did ravish and carnally know" the woman. *Commonwealth v. Fogerty*, 489.
2. An indictment for rape need not aver that the woman ravished was not the wife of the defendant. *Id.*

REAL ACTION.

See WRIT OF ENTRY.

RECORD.

The papers transmitted by a justice of the peace to the court of common pleas in a criminal case were a complaint, a record of the proceedings before the justice, signed by him, a warrant and officer's return, and a memorandum of a recognizance, signed by the justice. The warrant and the officer's return were each certified by the justice to be a true copy. *Held*, that, for want of an attestation of the conviction, the record was not sufficiently certified. *Commonwealth v. Burns*, 482.

RELEASE.

A release by a convict imprisoned for unlawfully selling intoxicating liquors, which have been seized and destroyed under a statute the constitutionality of which is doubted, of all claims for damages against the magistrates, officers and others who ordered and executed such seizure and destruction, made in consideration of an agreement of third persons to render all necessary and proper services fairly to bring before the governor and council an application for his pardon, and delivered as his deed to another person, to be by him kept until the arrival of the pardon, and then delivered to the releasees, cannot be revoked; but upon the performance of the agreement, and the arrival of the pardon, takes effect as from the first delivery; and is not contrary to public policy. *Timothy v. Wright*, 522.

See MORTGAGE, 6.

RELIGIOUS SOCIETIES.

See PARISHES AND RELIGIOUS SOCIETIES.

SALE.

1. A sale of intoxicating liquors in another state, by one citizen of this commonwealth to another, with knowledge or reasonable cause to believe that they were to be resold by the purchaser in this commonwealth against law, and with a view to such resale, will not support an action for the price in this commonwealth. *Webster v. Munger*, 584.
2. An agreement for the sale of all the wood standing on certain land, to be de-

- livered on the purchaser's land and there measured, and to be paid for according to such measurement, vests the title in the wood in the purchaser upon the delivery on his land. *Richmond Iron Works v. Woodruff*, 447.
3. A sale of a hog on credit, to be kept by the vendor until the purchaser shall call for it, and then paid for at its market price according to its then weight, after which the parties go together to the pen where the hog is, and the purchaser directs the vendor to keep it well, who assents, is not a sufficient sale and delivery against a subsequent purchaser. *Rourke v. Bullens*, 549.
 4. A sale and delivery of goods upon condition that the title shall not pass until payment of the price give the vendee no title which he can convey to a purchaser in good faith and for a valuable consideration. *Deshon v. Bigelow*, 159.
 5. If chattels are pledged without authority by a person to whom they have been entrusted by the owner for a special purpose, the pledgee, after notice of the true ownership, and a demand by the owner, which he refuses, is liable to a subsequent purchaser of the owner's rights, in trover, after a demand by such purchaser; although he has sold the chattels since the first demand, and before the second. *Carpenter v. Hale*, 157.
 6. An auctioneer, who had guarantied his sales, sold and delivered a chattel upon condition that the title should not pass until payment of the price; and upon the purchaser's failing to perform the condition, agreed with him to take the chattel, and settled with the seller of the chattel, after informing him of the facts. *Held*, that the auctioneer thereby acquired a perfect title, and might maintain trover against one claiming title by sale from such purchaser. *Riddle v. Coburn*, 241.
 7. H., C. and others agreed by indenture with the contractors for building a canal to take certain amounts of bonds of the canal company at the rate of \$60 for every \$100, payable in instalments; and trustees were appointed to superintend the completion of the canal, receive the bonds, and issue them to the subscribers, from time to time, on being paid the stipulated price. More than two years afterwards H. gave C. an order on the trustees, which they accepted, to deliver to C., on his paying them therefor sixty cents on the dollar, such bonds to a certain amount, "which I am entitled to receive under my subscription;" and with this order gave C. a bill charging him with this amount of bonds at eighty five and a half per cent., deducting the sixty per cent. to be paid on the delivery of the bonds, and adding an agreement that H., "if the above bonds are not delivered by said trustees" within six weeks, should "account to C. for the interest upon" the balance "after said time until said bonds are delivered." *Held*, that this was a sale to C. of H.'s right to take, on payment of sixty per cent., bonds to the amount specified, without any warranty of title to the bonds; that the agreement to pay "interest" was valid, and obliged H. to pay a continuing annuity of six per cent. on such balance, determinable upon the delivery of the bonds to C., either by the trustees, or by H. or his representatives; that a tender of the bonds to C., by the executors of H., three years later, with or without the consent of the trustees, put an end to this obligation; and that C., if he absolutely refused to accept the bonds so tendered, on the ground that the contract of all the parties was broken, and that he was

not then bound to accept or pay for them for any purpose, could not object to the validity or title of the bonds so tendered. *Corcoran v. Henshaw*, 267.

See ESTOPPEL; HOMESTEAD; MORTGAGE, 7; PLEADING, 2; SPIRITUOUS LIQUORS, 1.

SEAMAN.

A seaman does not forfeit his wages by leaving a dangerously unseaworthy vessel, which the master has unreasonably neglected to repair. *Savary v. Clements*, 155.

SEARCH WARRANT.

1. A search warrant for intoxicating liquors under *St.* 1855, c. 215, § 25, is not invalidated by so misnaming one street in the description of the place where the liquors are kept, as to make the application of the whole description impossible, if in other respects the place is described truly, and so as to identify it with the place described in the complaint. *Downing v. Porter*, 539.
2. A search warrant under *St.* 1855, c. 215, § 25, sufficiently describes the liquors intended to be seized as "a certain quantity of gin, being about and not exceeding one hundred gallons." *Ib.*
3. The provision of *St.* 1855, c. 215, § 25, that a search warrant for intoxicating liquors "shall be supported by the oath of the complainant," is complied with by the complainant's making oath to the complaint upon which the warrant is issued. *Ib.*
4. A search warrant for intoxicating liquors under *St.* 1855, c. 215, § 25, need not direct the complainant to be summoned to appear as a witness at the hearing of the complaint. *Ib.*

SENTENCE.

See CONVICT; SPIRITUOUS LIQUORS, 2.

SET-OFF.

See CARRIER, 2; DAMAGES, 6; INSOLVENT DEBTORS, 8; PROMISSORY NOTE, 4.

SHERIFF.

See ATTACHMENT.

SHIPS AND SHIPPING.

See BILL OF LADING; PLEADING, 1; SEAMAN.

SHOPBREAKING.

See HOUSEBREAKING.

SLANDER.

See EVIDENCE, 14; PLEADING, 5.

SPECIFIC PERFORMANCE.

See EQUITY, 3-5; TRUST, 2.

SPIRITUOUS AND INTOXICATING LIQUORS.

1. A sale of intoxicating liquor on credit is a sale within the meaning of *St. 1855, c. 215, § 15. Commonwealth v. Burns, 482.*
2. The *St. of 1855, c. 215, § 15*, does not authorize the increased punishment of a second unlawful sale of intoxicating liquors as a second offence, unless the fact that it is a second offence is alleged in the complaint or indictment. *Garvey v. Commonwealth, 382.*
3. A verdict of guilty upon an indictment on *St. 1855, c. 405*, for a nuisance by keeping a building used for the unlawful sale and unlawful keeping of intoxicating liquors, upon which no judgment has been rendered, is no bar to an indictment for being a common seller of intoxicating liquors at the same time and place. *Commonwealth v. Lohy, 459.*
4. Liquors not actually intoxicating, but which the *St. of 1855, c. 215, § 1*, declares "shall be considered intoxicating within the meaning of this act," may be described as "intoxicating" in an indictment on that statute. *Commonwealth v. Timothy, 480.*
5. An indictment on *St. 1855, c. 215, § 24*, for unlawfully keeping "intoxicating liquors" with intent to sell, need not more particularly describe the liquors kept. *Ib.*
6. On the trial of an indictment for unlawfully keeping intoxicating liquor with intent to sell, the Commonwealth may introduce evidence that there were jugs in the defendant's house, which had recently contained liquor. *Ib.*

See CONVICT; EVIDENCE, 1, 2, 6; PLEADING, 2; SALE, 1; SEARCH WARRANT.

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SURVEYOR OF HIGHWAYS.

See ACTION, 2.

TAX.

1. The sworn list of estate liable to taxation, required by *St. 1853, c. 319, § 3*, in order to authorize any abatement of a tax, cannot be filed after an appeal from the assessors to the county commissioners. *Otis Co. v. Inhabitants of Ware*, 509.
2. The *St. of 1853, c. 319, § 3*, providing that "no abatement shall be made of the taxes assessed upon any individual," until he shall have filed with the assessors a sworn list of his estate, applies to corporations. *Id.*

TENANT IN COMMON.

1. An agreement by tenants in common of land, to give "a good and sufficient

warranty deed " thereof, is complied with by a deed in which each warrants his title to his own share only. *Coe v. Harahan*, 198.

2. Two out of three tenants in common executed a lease for years of the whole estate, by which the lessee covenanted to insure for the benefit of the lessors. A policy was obtained accordingly, and assigned to one of the two cotenants, who recovered the whole amount of a loss from the insurers. *Held*, that he was liable to an action by the third cotenant for his proportion of the amount; and that the admission in evidence of a conversation between the defendant and a third person before the assignment of the policy, for the purpose of showing that the assignment was to be for the benefit of all the owners of the property, was no ground for a new trial. *Starks v. Sikes*, 609.

See EQUITY, 3.

TENDER.

See SALE, 7.

TIME.

See INSURANCE, 9, 10.

TOWN.

See WAY.

TRESPASS.

1. Evidence of frequently cutting wood and timber on a tract of woodland for more than twenty years, under a claim of title, will support an action of trespass against one who shows no title. *Kilborn v. Rewee*, 415.
2. A title acquired since the commencement of an action of trespass *quare clausum* is no justification of the trespass. *Ib.*

See ATTACHMENT; JUDGMENT, 1.

TROVER.

See MORTGAGE, 7; SALE, 5.

TRUST.

1. A bequest of a certain sum to "the Universalist Religious Denomination in the county of Berkshire, as a permanent fund, the use to be applied annually for the support of that denomination," is not void for uncertainty; and if no trustee is named in the will, equity will appoint trustees to execute the trust, on a bill filed by the organized Universalist Societies of the county. *Universalist Society in Adams v. Fitch*, 421.
2. By indenture, B. agreed to assign one mortgage and a judgment to A., and a mortgage on other land to A., or to any person whom he should designate, in trust for him; and A. covenanted "to reduce the property so conveyed to him into money," and invest the proceeds, and mortgage or pledge them to B. to secure the payment of an annuity to him. B. assigned the first mortgage and judgment to A., and, at A.'s request, assigned the other mortgage to C., who signed a declaration that he held it in trust for A. A. died insolvent, and C

was appointed administrator of his estate, and received the amount of this mortgage from a second mortgagee of the same land. *Held*, that equity would compel C. to apply so much of this amount as was necessary to secure the payment of the annuity to B. *Boyd v. Soule*, 554.

3. An inhabitant of this commonwealth died, leaving a widow and infant son, real and personal property in Massachusetts, and personal property in Wisconsin. Administration was taken out in each state, and the administrator in Wisconsin duly collected the property there, and, after the death of the widow, and on the supposition that no part of it would be needed in the settlement of the estate of either parent, invested it in Wisconsin, in the name of the son, and transferred it, pursuant to a judicial decree in Wisconsin, to the son's guardian in this commonwealth. The estates of both parents proving insolvent, it was *held*, that the administrator in this commonwealth might maintain a bill in equity here, (making the administrator of the widow's estate a party,) against the guardian of the son, to compel the application of the property so received by him to the payment of the debts of the father, and the distributive share of the widow. *Sheldon v. Kirkland*, 531.

See DEED; WILL, 1, 6, 7.

TRUSTEE PROCESS.

A verdict for the plaintiff in an action of tort will not make the defendant liable as his trustee in foreign attachment. *Thayer v. Southwick*, 229.

USAGE.

See PROMISSORY NOTE, 6.

USE AND OCCUPATION.

An agreement for the use and occupation of land, made on the Lord's day, is void by the Rev. Sta. c. 50; but if the land is subsequently entered upon and occupied, an action will lie for the use and occupation. *Stebbins v. Peck*, 553.

See LANDLORD AND TENANT.

VARIANCE.

1. A declaration, averring the existence of two considerations for a simple contract, is not sustained by proof of one; and the variance is not cured by verdict. *Stone v. White*, 589.
2. In an action against a railroad corporation for a personal injury, an averment in the declaration, that the plaintiff was struck by their locomotive engine while travelling in the highway, is not sustained by proof that, by means of the defendants' negligence in the management of their train, the plaintiff's horse was frightened, and ran or was driven out of the highway, five or six rods before reaching the railroad crossing, upon land owned by the defendants, and the plaintiff was there struck, while attempting to cross the railroad. And the declaration cannot be amended after verdict, so as to cure this variance. *Shaw v. Boston & Worcester Railroad*, 45.

See AMENDMENT, 2; POOR DEBTORS, 1.

VERDICT.

Upon an indictment for stealing bank bills and a gold coin, the jury returned this verdict: "Guilty, but not of taking the gold piece." *Held*, that the court might, against the objection of the defendant, record this verdict as a verdict of not guilty as to so much of the indictment as related to the stealing of the gold coin, and guilty as to the residue; although the jury, pursuant to agreement of the parties, had separated after finding their verdict. *Commonwealth v. Stebbins*, 492.

See SPIRITUOUS LIQUORS, 3; TRUSTEE PROCESS; VARIANCE.

VOTE.

See PARISHES AND RELIGIOUS SOCIETIES, 1-3, 7.

WAGER.

See GUARANTY, 1.

WAGES.

See SEAMAN.

WAIVER.

See CONDITION, 2; EXCEPTIONS, 4; PAUPER, 4.

WARRANT.

See PARISHES AND RELIGIOUS SOCIETIES, 4; SEARCH WARRANT

WARRANTY.

See HORSE; SALE, 7; TENANT IN COMMON, 1.

WATERCOURSE.

See ACTION, 2; EQUITY, 1; MILL.

WAY.

In an action to recover of a town damages sustained by a defect in a part of the highway, which has been so wrought and repaired by the town for public travel as to induce the public to pass over it, the town cannot introduce evidence that that part of the highway was originally wrought for the accommodation of the abutters. *Kellogg v. Inhabitants of Northampton*, 504.

See ACTION, 2.

WILL.

1. By a devise and bequest, in trust to pay the net income to a daughter of the testator for life, and, upon her decease, to select out of the property a sufficient amount to pay a certain sum to her surviving husband, and to appraise and divide the residue and convey it in equal shares to her children or their issue in fee, the trustees take an estate in fee; and upon the death of the

daughter, and after payment of the sum to her husband, are bound to appraise, divide and convey the residue to her issue. *Sears v. Russell*, 86.

2. Where property is devised and bequeathed in trust to pay the income to a daughter of the testator for life, and, upon her decease, to convey to her children then living, in equal shares, and to the issue of deceased children, to hold to them, their heirs and assigns forever; or, in default of any such child or issue, to convey to the heirs at law of the testator, and in case of the death of any child of the daughter, without issue, after its mother, and before its father, the share of such child not to go to its father, but to the testator's heirs at law; the gift of the share of a child of the daughter, in case of such death of that child, is to those who shall be then the heirs at law of the testator; but such gift is void for remoteness, and therefore the issue of the daughter are entitled, upon her death, to a conveyance in fee. *Ib.*
3. *It seems*, that in a will devising and bequeathing property in trust to convey it, upon the termination of a life estate, to certain persons or their issue in fee, and, in default of such persons or issue then living, to the testator's heirs at law, a provision that this shall not prevent any of those persons, who shall have arrived at a certain age before the termination of the life estate, from disposing of their shares by will, is inconsistent with and defeats the gift over to the testator's heirs at law. *Ib.*
4. The word "descendants," in a will, cannot be construed to include any but lineal heirs, without clear indications, in the will, of the testator's intent to extend its meaning. *Baker v. Baker*, 101.
5. A testator devised and bequeathed all his property to trustees, and directed them to pay certain debts and legacies, to allow his wife and son the income of certain real estate for life, and to advance a certain sum and lend certain apparatus to W., who had been employed in the testator's business, to be used in that business, he paying the testator's son one quarter of the net profits, so long as the son should not be concerned in similar business, and if the son should break this condition, then this sum to fall into the residue of the estate; and further directed that the income of his property, after fulfilling the above provisions, "and as the same shall fall in from time to time by the termination of life or otherwise, and also the principal of said residue," should be disposed of as follows: One third of the income to his wife for life, one third to his son for life, and the remaining third to his daughter for life; at the death of the wife, "one half of the third of said income to which she would be entitled, if living," to the son, if surviving, and the other half to the daughter, if surviving; at the death of the daughter, "the proportion of said property, of which she was entitled to the income, shall go to her descendants, in such manner as the same, if her property as a feme sole, would descend or be distributed according to law;" and upon the death of the wife, if she should survive the daughter, one half of the third of the principal, of which she was entitled to the income, to go to the descendants of the daughter in like manner; and if, at the time when the descendants of the daughter, if any, would be entitled to any of the principal, there should be no such descendants, then it should go to the son's descendants; and added similar provisions as to the son and his descendants;

and provided that if, at the time of the termination of the trust for the payment over of the income of the whole or any part of the property, there should be no descendants then surviving of the son or daughter, then such whole or part should go to certain charitable institutions. *Held*, that upon the death of W. the sum advanced and the apparatus lent to him were to be added to the residue of the estate; and that, upon the death of the daughter, without issue, in the lifetime of her mother and brother, one third of the residuary fund should be paid to the children of the brother at that time, and their issue. *Ib.*

6. A testator devised a house to his only daughter, and directed that it should not be sold during her minority, but the income should be appropriated to her support, and that "the property so bequeathed, namely, said house, together with the residue hereinafter specified, should be received by" a guardian named in the will, "in trust for the uses of" the daughter until her majority or marriage; and "gave and bequeathed" to her "all the rest and residue of his property, of every description;" and directed that the income of the "property bequeathed" to her should be applied to her support until her marriage or majority, "on the occurrence of either of which events she shall have the full control of her property," and in case of her death before either of those events, "the property bequeathed to her in the foregoing presents shall be divided" into certain pecuniary legacies, and the residue between several charitable societies. *Held*, that the daughter, by the will, took an estate in fee in the house, subject to the trust; and that, at her death under age and unmarried, the estate should be sold by the executors for the payment of the pecuniary legacies. *Gibbens v. Curtis*, 392.
7. Legacies of money, in terms absolute, but immediately followed by an appointment of a trustee to "take and keep the above legacies, the income of which he shall appropriate to their comfort as long as they live; after their decease, what remains I bequeath to him," give the first legatees the right to the income only, although not sufficient for their comfortable support. *Barrus v. Kirkland*, 512.

See TRUST, 1.

WITNESS.

1. In an action against a husband for necessities furnished to his wife while lawfully absent from his house, a son of the defendant, called as a witness by him, may be asked, on cross-examination, in order to impeach his testimony and show his interest, what was the consideration of a conveyance made to him by his father, and whether it was not fraudulent; and also if his father lived with him, and paid board to him. *Mayhew v. Thayer*, 172.
2. In an action for an injury occasioned by digging a watercourse in a highway under the direction of the surveyors of highways, one of the surveyors, being called as a witness for the defendant, denied, on cross-examination, that he ever stated that this work was done as he had directed. *Held*, that the plaintiff might introduce evidence to contradict him on this point. *Benjamin v. Wheeler*, 409.
3. Testimony that certain statements were made to a witness cannot be con-

tradicted by evidence that the statements to which he testifies were not true. *Collins v. Stephenson*, 438.

4. A witness, who, being called by one party, testifies that he has never threatened revenge against the other party, may be contradicted on this point by other testimony. *Ib.*
5. A witness testified on cross-examination that he had never expressed any hostile feelings towards the defendant. The defendant, for the purpose of contradicting him, offered evidence that the witness, in conversation with a third person about a note which had just been signed by the witness and then by the defendant, said that the defendant had never paid him for certain services, and that he was worth nothing himself and had taken this course to get money out of the defendant. *Held*, that the exclusion of this evidence was no ground of exception. *Starks v. Sikes*, 609.

WRIT OF ENTRY.

1. An equitable estate will not sustain a writ of entry. *Chapin v. Universalist Society in Chicopee*, 580.
2. By the Rev. Sts. c. 101, §§ 15, 24, an application for the assessment of rents and profits upon a writ of entry cannot be made after verdict for the demandant on the title, unless an order is passed by the court, before such verdict is recorded, postponing the assessment. *Judd v. Gibbs*, 435.
3. A writ of entry to foreclose a mortgage made to secure a note to two jointly may be prosecuted, after the death of one of the two, by the survivor. *Blake v. Sanborn*, 154.
4. Under a plea of nul disseisin and payment to a writ of entry to foreclose a mortgage, the defendant cannot deny his possession. *Richmond Iron Works v. Woodruff*, 447.

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